

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF NEW MEXICO

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 VS.

CR. NO. 15-4268 JB

6 ANGEL DELEON, et al.,

7 Defendants.

8 VOLUME 3

9 Transcript of Motions to Suppress Proceedings  
10 before The Honorable James O. Browning, United States  
District Judge, Las Cruces, Dona County, New Mexico,  
11 commencing on January 10, 2018.

12 For the Government: Ms. Maria Armijo; Mr. Randy  
Castellano; Mr. Matthew Beck

13 For the Defendants: Mr. Brock Benjamin; Ms. Cori  
14 Harbour-Valdez; Mr. Pat Burke; Mr. Robert Cooper; Mr.  
James Castle; Mr. Jeff Lahann; Mr. John Granberg; Mr.  
15 Scott Davidson; Ms. Amy Jacks; Mr. Richard Jewkes;  
Ms. Amy Sirignano; Mr. Christopher Adams; Mr. Marc  
16 Lowry; Ms. Theresa Duncan; Ms. Carey Bhalla; Mr.  
William Maynard; Mr. Donovan Roberts; Ms. Lisa  
17 Torracco; Ms. Angela Arellanes; Mr. Jerry Walz

18 For the Witness Montoya: Mr. Michael Keefe

1 THE COURT: All right. We'll go on the  
2 record. I understand we still don't have a witness  
3 here, so we're going to have to decide what we're  
4 going to do. Whether we're going to --

5 MR. CASTLE: And a defendant, Your Honor.

6 THE COURT: So we're going to have to  
7 decide what we're going to do.

8 Mr. Keefe, how are you this morning?

9 MR. KEEFE: Good morning, Judge.

10 THE COURT: We don't have a witness yet.

11 MR. KEEFE: That's my understanding, Your  
12 Honor.

13 THE COURT: Okay. Well, we didn't -- I  
14 don't know what we can profitably do. We just pushed  
15 everything back.

16 But let me make a couple of statements,  
17 then we'll see if there are some other things we can  
18 do here before we start those two motions.

19 Ms. Standridge talked to Matt Dykman, Clerk  
20 of the Court, about the defendants' request for a  
21 room. There is probably nothing in this building.  
22 But -- no promises, but Mr. Dykman is looking at  
23 something maybe in the Runnels Building nextdoor.  
24 Before we spend a lot of time trying to find  
25 something over there, would that work? I mean, would

1 that be better than your current room? Would it be  
2 better than nothing? What's your thoughts?

3 MS. HARBOUR-VALDEZ: For Trial 2, we would  
4 like that. I don't know about 1.

5 THE COURT: How about 1? Is it worth the  
6 effort? Ms. Jacks?

7 MR. JACKS: Yes.

8 THE COURT: Yes. Okay. So again, no  
9 promises, but Ms. Standridge will communicate that to  
10 Mr. Dykman, and we'll see if -- there is a couple of  
11 possibilities over there, but no promises.

12 The second thing is, before we get started,  
13 I have a typographical question for all of you. But,  
14 as we begin to put things in front of the jury, I  
15 think it has maybe some importance, as I start  
16 putting jury instructions in front of them. And I'm  
17 not sure whether the Government or the defense should  
18 address it. So anybody jump in to answer, but how  
19 should I spell Sindicato, when referring to SNM? The  
20 indictment and media have been spelling it with a Y.  
21 Whereas, the Spanish Language Dictionary spells the  
22 word with an I, S-I-N-D-I-C-A-T-O. Your thoughts as  
23 to what my preliminary instructions -- and as we talk  
24 to the jury and begin to put written product in front  
25 of them, what it should say? Ms. Armijo?

1 MS. ARMIJO: Your Honor, I believe both are  
2 used, both spellings are used by members. We have  
3 members that have tattoos with both the Y and the I.  
4 I guess, if the Court is not inclined to use both, I  
5 guess we would request it be consistent with the  
6 indictment. But both are used by the members.

7 THE COURT: Are the defendants comfortable  
8 with using a Y, if I put it in a preliminary  
9 instruction? I don't know what I'm putting in a  
10 preliminary instructions. But anybody have any  
11 problem with that? All right. I had switched over  
12 in my writing to an I, after one of the defense  
13 lawyers sent me something. But I think I'll go back  
14 to Y, unless anybody says otherwise.

15 Well, I understand, through Ms. Standridge,  
16 that the Government is suggesting that we try to do  
17 some argument on the motion before the witness gets  
18 here.

19 Ms. Sirignano, Mr. Adams, it's y'all's  
20 motion. What's your thoughts?

21 MR. ADAMS: Judge, I don't know what I have  
22 to add other than what's in the notion. We have a  
23 cellphone that was given -- I need to get better at  
24 this since Oprah may not be in her job much longer.

25 I think we laid out in our arguments in

1 1529, there are factual questions. We have two  
2 issues. One related to the destruction of the  
3 cellphone, which had been given to Mario Montoya.  
4 And he -- there is a recorded conversation where he's  
5 instructed by an alleged member of the SNM to destroy  
6 the phone. The phone was destroyed, and ultimately  
7 disposed of by Special Agent Acee. And so we have  
8 questions about that, which are laid out.

9 And then there is a body wire. And we  
10 don't know whether the body wire was a full  
11 recordation or whether it was partially recorded and  
12 what the instructions were for Mr. Montoya. So I'm  
13 certainly capable of filibustering until the witness  
14 arrives. But I think our position is fairly clear,  
15 and I think the witness will -- if he's able to  
16 resolve any of the issues, he will resolve them when  
17 he's under oath. If he's unable to resolve any  
18 issues, then I think we'll have an argument about why  
19 evidence, that could be very important for the  
20 defense, was not preserved or not recorded.

21 So that's basically our motion.

22 THE COURT: Is the only witness you're  
23 going to call Mr. Montoya?

24 MR. ADAMS: That's the only witness we  
25 intend to call. They may -- I anticipate they may

1 want to call Special Agent Acee, if there is anything  
2 to rebut.

3 THE COURT: Okay. All right. Thank you,  
4 Mr. Adams.

5 Mr. Beck, are you going to be handling  
6 this?

7 MR. BECK: Yes.

8 THE COURT: Mr. Beck.

9 MR. ADAMS: And, Judge, I guess I will say  
10 we don't necessarily have agreement on who has the  
11 burden of proof in this. We captioned 1529 as a  
12 motion to suppress. I'm a defense lawyer, so  
13 therefore, I would prefer to cross. But if we need  
14 to do direct, I can probably learn how to do that.

15 THE COURT: All right. Mr. Beck.

16 MR. BECK: I'll start with that last point.  
17 I think we're all familiar with the Trombetta and  
18 Youngblood standards in which the burden is on the  
19 defense to prove that the Government destroyed  
20 exculpatory or potentially exculpatory evidence.

21 I think the one portion in which Mr. Garcia  
22 may believe that his 1529 motion is a motion to  
23 suppress, is pages 7 to 8, in which Mr. Garcia argues  
24 that the United States has not authenticated the  
25 audio recordings. That's not a basis for a motion to

1 suppress. That would be a basis to exclude the  
2 evidence at trial.

3 So that's not a motion to suppress.  
4 Really, what this is, is a due process motion for  
5 destruction of evidence.

6 I think throughout -- and so I think the  
7 reason that argument may be helpful here is to put  
8 these motions in context. I think 1330 and 1529 go  
9 hand in hand. 1330 was at a time in which there was  
10 confusion which cellphone was destroyed. I think the  
11 defense believed it was Eric Duran's cellphone. It  
12 was, indeed, the cellphone that Mario Montoya had.  
13 So these two motions all go to the same thing, which  
14 was the fact that that cellphone no longer exists.

15 The evidence -- I think that's also an  
16 important distinction to recognize, because Eric  
17 Duran's cellphone was a cellphone in prison. So it  
18 was the only cellphone he had. So over the last two  
19 days we've heard evidence that there may have been  
20 photographs on that phone. Eric Duran, I think, said  
21 he took selfies in there, because that's what you  
22 would do with a cellphone in prison.

23 You'll hear today in the testimony that  
24 there is a difference when Mario Montoya is not in  
25 prison, and he's provided a government flip phone.

1 He had his own personal cellphones, on which he would  
2 take selfies, photographs, or whatever they may be.  
3 And so, to the extent that there is the potential for  
4 exculpatory evidence on a cellphone, it is much less  
5 when Mario Montoya only used this government-provided  
6 cellphone to capture recordings of the defendants in  
7 this case. It is very unlike Duran's cellphone,  
8 which would have been used in prison.

9 Also, it's a flip phone. You'll hear it's  
10 a Verizon flip phone, purchased from Walmart for \$19.  
11 So there are no apps on the phone, like Facebook and  
12 Twitter. There is no GPS data. There is no location  
13 tracking on this phone. I think there may be web  
14 browsing, but web browsing on a flip phone is not  
15 practical.

16 So the potential for exculpatory  
17 information in this limited flip phone that Mr.  
18 Montoya used only to record conversations is much  
19 less than it may have been in 1330, where it was  
20 Duran's cellphone in the prison.

21 I think you'll also hear that Mr. Montoya  
22 will say that it was accidental that he ran over the  
23 phone. And I think it's important to note that  
24 that's not the destruction of the evidence that  
25 matters here. It surprises me to hear that



1 Mr. Garcia intends only to call Mario Montoya.  
2 Because Mario Montoya broke apart the phone. But it  
3 was Special Agent Acee who destroyed the evidence,  
4 who destroyed the physical phone. His affidavit,  
5 which was attached, and his testimony, I expect, will  
6 be that it was leaking battery acid, and because of  
7 that, he destroyed it as a hazard.

8 So they will not be able to meet their  
9 standard under Trombetta or Youngblood. I mean,  
10 there is no evidence -- there will be no evidence, I  
11 expect, that it was apparently exculpatory. There  
12 will be no evidence of bad faith because, when the  
13 phone was taken to Special Agent Acee in multiple  
14 pieces, he threw it out because the battery acid was  
15 leaking. At best, that will be negligence. As we  
16 found through the course of these pretrial hearings,  
17 negligence just doesn't get there. It has to be bad  
18 faith destruction.

19 Another factor that plays in is there was a  
20 consensual and court-ordered wiretap on this phone.  
21 So that all of the text messages and phone calls in  
22 their entirety, without exception, were preserved by  
23 the FBI pursuant to their normal Title III  
24 requirements, and those were all produced to the  
25 defendants.

1           So a lot of the points that the defendants  
2           were unclear about, whether there was selective  
3           recording, or whether the recordings were only  
4           partial, or Mr. Montoya deleted some, impossible. It  
5           was a Title III wiretap. All those calls, all those  
6           text messages have been produced to the defendants.

7           I think that probably gets at it. The last  
8           thing is the body wire evidence. This was simply a  
9           listening device in which -- which operated much like  
10          a walkie-talkie. The agents would turn it on when  
11          they were with Mario Montoya. He would carry it on  
12          his person. At that point, they listened in on  
13          everything from the time they turned it on to the  
14          time they turned it off.

15          In addition to that, there is a third  
16          reception device for this audio body recording, which  
17          is the FBI downloads the entire content of this  
18          conversation in real-time. So in addition to the  
19          agents listening, this conversation is recorded, I  
20          believe, in Quantico. And then what happens is,  
21          after they're done, the ELSUR technician in  
22          Albuquerque, from her ELSUR computer, then goes into  
23          this mainframe in Quantico, downloads it, and puts it  
24          onto a disc. And that's how we obtained it to  
25          produce to the defendants.

1           So there is no way in which what is  
2     captured on those recordings produced is not  
3     everything that transpired in that time. There is no  
4     way that anyone could have gone in there and edited  
5     those conversations. And you'll hear from the agents  
6     at trial, when they testify about hearing those  
7     conversations, that that's not what happened.

8           So with that being said, I think correctly  
9     it is the defendants' burden to produce this  
10    evidence. But if they don't intend to call Special  
11    Agent Acee, I foresee that we will call him in  
12    rebuttal just to cover all of our bases. And given  
13    the way that the Court has conducted these pretrial  
14    hearings, it makes as much sense for me to call him  
15    now and proceed with direct as it would later.

16           THE COURT: All right. Do you want to call  
17    Special Agent Acee?

18           MR. BECK: Yeah, the United States would  
19    call Special Agent Acee.

20           THE COURT: All right. Mr. Acee, since  
21    we're going into another hearing in another set of  
22    motions, I'll have Ms. Standridge swear you in.

1 BRYAN ACEE,  
2 after having been first duly sworn under oath,  
3 was questioned and testified as follows:

4 DIRECT EXAMINATION

5 THE CLERK: Please be seated. State and  
6 spell your name for the record.

7 THE WITNESS: Bryan Acee, A-C-E-E.

8 THE COURT: Mr. Acee. Mr. Beck.

9 BY MR. BECK:

10 Q. Special Agent Acee, I'm going to go through  
11 your background a little bit quicker here. How are  
12 you employed?

13 A. I'm a Special Agent with the FBI, assigned  
14 to the Albuquerque Field Office.

15 Q. And were you the Special Agent who is the  
16 lead case agent into the investigation of the SNM  
17 that led to this case?

18 A. Yes, sir.

19 Q. In connection with that, did you use  
20 consensual cellphone wiretaps of certain cooperators?

21 A. Yes.

22 Q. Did you have a consensual cellphone wiretap  
23 for Mario Montoya?

24 A. I did.

25 Q. What was the cellphone that you used to

1 tap -- what cellphone did you tap in connection with  
2 that?

3 A. It was a phone I purchased at Walmart. It  
4 was a Samsung. I think, in my notes back there at  
5 the table, I may have the model number. But it was a  
6 flip phone I purchased. And service was through  
7 Verizon.

8 Q. Where did you purchase that cellphone?  
9 Where did the FBI purchase that cellphone?

10 A. I purchased it at a Walmart store.

11 Q. Did you provide that cellphone to Mr.  
12 Montoya?

13 A. I did.

14 Q. What did you tell Mr. Montoya when you gave  
15 him that cellphone?

16 A. That phone was to be used with his  
17 communications with other SNM members; that we'd be  
18 recording everything that took place on that phone;  
19 and that he was to use it only in communicating with  
20 those members.

21 Q. Did he follow those directions?

22 A. He did.

23 Q. And how do you know that?

24 A. Well, we recovered recordings, and text  
25 messages. And I know that he followed that, because

1 we had other listening devices utilized. And his  
2 communications with me were as per my instructions,  
3 with a separate phone, with what I'll call one of his  
4 personal phones.

5 Q. So he communicated with you with a personal  
6 phone other than the flip phone you gave him?

7 A. Yes. If I recall correctly, he had two  
8 personal phones; then he had the FBI phone that was  
9 utilized just for communications in furtherance of  
10 our investigation.

11 Q. For his cellphone, did you have a  
12 court-ordered wiretap to intercept calls and text  
13 messages on that phone?

14 A. On his cellphone that I provided him, we  
15 had the court order.

16 Q. And how did you obtain that court order?

17 A. Through my work with your office.

18 Q. Did you go to a magistrate judge and apply  
19 for that wiretap?

20 A. I did. I believe actually Ms. Armijo may  
21 have obtained it for me. We did eight of them with a  
22 number of extensions. But I worked with Ms. Armijo  
23 to secure those.

24 Q. Did you have Mario Montoya's consent to tap  
25 that phone?

1           A.    I did.  I used our standard FBI forms to  
2   obtain consent.

3           Q.    When Mr. Montoya used that phone, did you  
4   indeed capture all of the conversations and text  
5   messages on that phone?

6           A.    Yes.

7           Q.    How do you know that?

8           A.    They were provided to me through our  
9   Electronic Surveillance Unit in a complete package.

10          Q.    What's the Electronic Surveillance Unit?

11          A.    The FBI has a unit that's dedicated to wire  
12   interceptions.  There is a standard protocol that,  
13   once we obtain a court order, we provide our  
14   technical agents with that court order, and all of  
15   our internal approvals.  It's provided to our  
16   Electronic Surveillance Unit.  And then they serve it  
17   on the phone company.  They, in turn, collect the  
18   data from the phone company pursuant to the court  
19   order.  And then they pipe that information to the  
20   field office, so that we can review it in a wire  
21   room.

22          Q.    And that procedure happened with the phone  
23   that was destroyed in this case?

24          A.    Yes, sir.

25          Q.    Mr. Montoya's phone?

1 A. Correct.

2 Q. So the record that we received from the  
3 wiretap and we provided to the defendants, was that a  
4 complete and unbridged record of all the phone calls  
5 conducted on Montoya's phone?

6 A. Yes.

7 Q. How did you determine which phone calls or  
8 text messages would be recorded and preserved?

9 A. All of them were.

10 Q. And what data could have been intercepted  
11 pursuant to that wiretap and wasn't intercepted?

12 A. All telephone calls and text messages.

13 Q. So was there any data or telephone calls,  
14 text messages, that could have been intercepted that  
15 weren't?

16 A. No.

17 Q. At some point, did you learn that Mr.  
18 Montoya had broken his phone?

19 A. Yes.

20 Q. What happened?

21 A. Well, I just prior to the takedown on  
22 December 3, I caused Mr. Montoya to be relocated out  
23 of state for his safety. I did collect the phone  
24 before the takedown, because I anticipated there  
25 could be some last minute phone calls, and I wanted



1 him to be able to answer the phone. So I made  
2 arrangements to collect the phone from him, I think  
3 about a week after the takedown. He was back in New  
4 Mexico for a short period of time. So I asked him to  
5 bring the phone. He said there was a problem; that  
6 he damaged it. I said, "Just bring it." And when we  
7 met, he gave me the phone. And it was in bad shape.

8 Q. What do you mean "in bad shape"?

9 A. It was cracked, the glass screen was  
10 cracked. The back cover was missing. The battery  
11 was -- it had a -- not a crack, but like a -- it was  
12 damaged as well. There was fluid in that area that  
13 was kind of looked like syrup, to describe it. And  
14 it was missing quite a few pieces. He apologized.  
15 If I remember correctly, he said when he was loading  
16 an RV that he had purchased to move out of state in,  
17 he ran it over. I think it was like in his  
18 daughter's backpack, or in a backpack with some of  
19 his daughter's other electronic devices that he'd  
20 also run over, and was pretty upset about.

21 Q. Did you believe Mr. Montoya when he told  
22 you he ran over it?

23 A. I did.

24 Q. What did you do with the phone?

25 A. I disposed of it.

1 Q. Why did you do that?

2 A. For a couple reasons. At the time, I  
3 didn't consider the phone itself evidence. If it had  
4 been in good shape, I would have recycled it and used  
5 it in another case after it had been wiped. That  
6 would save the Bureau some money, save me or the  
7 Bureau \$19 buying another one, I guess. I have a box  
8 of phones that I'll save and recycle. So, like I  
9 said, I didn't consider it evidence at the time. And  
10 because of the condition that it was in, I didn't  
11 want to leave it in my desk drawer or throw it in  
12 with the other phones. So I simply discarded it.

13 Q. Why didn't you want to leave it in your  
14 drawer and put it with the other phones?

15 A. It wasn't in a working condition. So there  
16 wasn't any reason, in my mind at the time, to keep  
17 it. I had no use for it, and it was not able to  
18 work.

19 Q. Did you think that there was exculpatory  
20 evidence on the phone?

21 A. I didn't. If I had any inclination that  
22 there was, I would have kept it.

23 Q. What would have given you that inclination?

24 A. I'm not sure what would have given me -- I  
25 guess --

1 Q. Let me ask that a different way. Did Mario  
2 Montoya tell you he took photographs using that flip  
3 phone?

4 A. No.

5 Q. Did Mario Montoya tell you he searched the  
6 internet on that cellphone?

7 A. No.

8 Q. Did Mario Montoya tell you that he made  
9 videos on that phone?

10 A. No.

11 Q. What did you think Mario Montoya used that  
12 phone for?

13 A. He just used that phone when we had  
14 operations. There were a couple of times where he  
15 would get nervous, and he'd be going to a meet  
16 location to meet with us before a deal, and he'd  
17 forget to bring the phone, because it wasn't his. He  
18 only used it on our operations, so he'd be on his way  
19 and then he'd tell me, "Hey, I'm going to be late.  
20 I've got to go back to the house and get the phone."  
21 My impression was he only used it, and my impression  
22 is correct because we didn't have any recordings from  
23 anyone else, only targets of the investigation.

24 Q. I want to talk now about a body recording  
25 device that Mario Montoya used in this case. Did he

1 use a body recorder?

2 A. He did.

3 Q. What did he use it for?

4 A. Anytime he met with a target of the  
5 investigation in person, we equipped him with a body  
6 recorder so that that meeting or transaction could be  
7 recorded.

8 Q. How often did he use the body recorder?

9 A. Every time he met with a target of the  
10 investigation and we were conducting surveillance of  
11 that meeting.

12 Q. Now, for example, when you used this body  
13 recorder, what was the procedure that you would go  
14 through with Mr. Montoya?

15 A. I maintained custody of the body recorder.  
16 I would meet with Mr. Montoya before the deal,  
17 because we searched him and his vehicle. I would  
18 then give him the body recorder. We'd cover any  
19 last-minute instruction or questions. We'd go over  
20 our standard briefing stuff, safety considerations,  
21 stuff like that.

22 When it came time for Mr. Montoya to  
23 actually meet with the target, I would activate the  
24 recording. I would listen live. This particular  
25 advice allowed me to do that, as well as the other

1 agents on scene. And then I would deactivate the  
2 recorder when the deal was over and I would recover  
3 it from him because we needed to do a post-buy or a  
4 post-meeting search, and that's when I would recover  
5 the device.

6 Q. While these operations were going on, did  
7 the body recorder record everything that happened  
8 between the time that you turned it on and the time  
9 that you turned it off?

10 A. Yes, sir. To be very specific, I started  
11 it before Montoya would arrive. And that's why  
12 you'll hear on a lot of the recordings there is music  
13 playing in the car. Then I would deactivate it once  
14 he was away from the location. I'd wait a few  
15 seconds, until he was driving away before I turned it  
16 off.

17 Q. Did you listen to the recordings in  
18 real-time as they were going on?

19 A. I did.

20 Q. Were the recordings stored somewhere else  
21 in real-time as you were listening?

22 A. Yes, sir, they were.

23 Q. How does that work?

24 A. So that the device allows us to listen in  
25 live. And at the same time, whatever is being picked

1 up on that wire is being recorded through -- at our  
2 Electronic Surveillance Unit. So after the deal,  
3 I'll tell our electronic surveillance technician that  
4 I need a download of that, and then she will provide  
5 that to me on a CD.

6 Q. Have you listened to the recordings that  
7 were on that CD that we provided to the defense?

8 A. Yes, sir.

9 Q. And are they the same recordings -- are  
10 they the same conversation that you heard  
11 contemporaneously with when you recorded them?

12 A. They are.

13 MR. BECK: May I have a moment, Your Honor?

14 THE COURT: You may.

15 MR. BECK: Pass the witness, Your Honor.

16 THE COURT: Thank you, Mr. Beck.

17 Mr. Adams, do you have cross-examination?

18 Ms. Sirignano, cross-examination of Mr. Acee?

19 EXAMINATION

20 BY MS. SIRIGNANO:

21 Q. Good morning, Agent Acee.

22 A. Good morning.

23 Q. Agent Acee, you provided an affidavit for  
24 the Government's response to our motion to suppress;  
25 correct?

1 A. Yes.

2 Q. And that affidavit is consistent with what  
3 you testified to today; correct?

4 A. Yes.

5 Q. What was the phone number that Mario  
6 Montoya had that the FBI gave him?

7 A. I have it on my notes, if I could retrieve  
8 those.

9 Q. That's fine.

10 A. Could I do that quickly?

11 Q. Sure.

12 A. The telephone number was 505-219-7757.

13 Q. And you got the phone at Walmart?

14 A. I did.

15 Q. How much was it?

16 A. It was 19.99 before taxes.

17 Q. Did you sign up Mr. Montoya as an informant  
18 in this case?

19 A. I did.

20 Q. When was that?

21 A. I couldn't tell you off the top of my head.

22 Q. Was it in the fall of 2015?

23 A. I believe so.

24 Q. Okay. And how did you come about signing  
25 him up as an informant?

1 A. I arrested him.

2 Q. For what?

3 A. Possession with intent to distribute  
4 heroin, and being a felon in possession of a firearm.

5 Q. Are those charges pending today?

6 A. Yes.

7 Q. What other benefits did you give Mr. -- let  
8 me rephrase.

9 What did you tell Mr. Montoya when you  
10 signed him up as an informant regarding those cases?

11 A. Well, he was a pretty smart guy. He wanted  
12 to talk, but he wanted to consult with an attorney  
13 before he did. So I helped facilitate that.

14 Q. And who is his attorney?

15 A. Michael Keefe.

16 Q. From the federal defender's office?

17 A. Yes, ma'am.

18 Q. So he met with Mr. Keefe before signing up  
19 with you?

20 A. Yes.

21 Q. When was that?

22 A. I think it took us -- if we say the fall of  
23 2015 -- I think it took roughly a couple of weeks to  
24 kind of line everything up. He was provided with a  
25 Kastigar letter, and we also had to coordinate with



1 the State. So it took a little longer than normal.  
2 But within, I think, a few weeks, we had a sit-down  
3 meeting -- I believe it was at the he Federal Public  
4 Defender's Office.

5 Q. What did you have to coordinate with the  
6 State?

7 A. I was looking at Mr. Montoya or his  
8 involvement in the Shane Dix homicide, which was a  
9 cold case and unsolved. And because the  
10 Government -- I don't want to mischaracterize the  
11 Government, but I don't believe we initially had  
12 jurisdiction there, and it required the District  
13 Attorney's Office be involved.

14 Q. To investigate the Shane Dix homicide?

15 A. Yes. Well, I just think it was proper for  
16 the DA's office and the Sheriff's Office to be there.  
17 They were also at that initial meeting. And I wasn't  
18 driving that train. That was the attorneys with the  
19 U.S. Attorney's Office and the District Attorney's  
20 Office.

21 Q. He confessed to that homicide; correct?

22 A. No. He explained his participation in it.  
23 But per his statement, he didn't pull the trigger.  
24 He was involved in that homicide, though.

25 Q. So did you sign him up like a regular

1 informant, with all the FBI policies and the  
2 paperwork?

3 A. Yes, ma'am.

4 Q. What was his name in the FBI?

5 A. "Pyro."

6 Q. "Pyro." Did you pay Mr. Montoya?

7 A. He received benefits in the form of, like,  
8 fuel, relocation. And I paid for a trade school for  
9 him. I don't believe I ever paid him where I handed  
10 him cash and he signed a receipt for that. My  
11 payments were definitely benefits, but I don't  
12 believe I ever gave him money because he was working  
13 off charges.

14 Q. And you said the charges are still pending?

15 A. Yes.

16 Q. And he picked up new charges recently;  
17 correct?

18 A. He did.

19 Q. You said he had two personal phone numbers,  
20 in addition -- or two personal phones in addition to  
21 the FBI phone. Do you know those two numbers?

22 A. I don't. Mr. Montoya had a lot of phones,  
23 and he changed his numbers frequently, like a lot of  
24 guys like him do.

25 Q. What does that mean?

1           A.     That means a lot of the SNM informants and  
2     other informants that are involved in drug  
3     trafficking, they frequently change their numbers.

4           Q.     So would you call him on the FBI phone or  
5     would you call him on his personal phone?

6           A.     Personal.

7           Q.     What was that number?

8           A.     I couldn't tell you.

9           Q.     Why would you call him on the personal  
10    phone?

11          A.     That's how I communicated with him.

12          Q.     Why?

13          A.     Well, I needed to communicate with him as  
14    an informant.

15          Q.     But his personal phone wasn't being  
16    recorded; correct?

17          A.     It was not.

18          Q.     Why did you choose to use that phone  
19    instead of the recorded phone?

20          A.     Well, I'm not the subject of the  
21    investigation, so I'm not interested in recording  
22    myself.

23          Q.     Have you turned over the calls on his  
24    personal phones to the U.S. Attorney's Office?

25          A.     No.

1 Q. Why not?

2 A. I don't believe they contain any evidence.

3 Q. They were involved in the investigation;  
4 correct?

5 A. They were.

6 Q. And you didn't turn it over?

7 A. I have not turned over the personal phone  
8 records of any of the informants.

9 Q. So you're saying that you used other  
10 informants' personal phones to conduct an FBI  
11 investigation?

12 A. No, I don't use their phones to conduct the  
13 investigation. I use their phones to call them to  
14 talk to them.

15 Q. Which, presumably, would involve an  
16 investigation, right, a federal investigation?

17 A. I think everything I do involves a federal  
18 investigation. But the fact that I'm talking to an  
19 informant to relay instructions to him, or safety  
20 concerns, or tell them to meet me somewhere is not  
21 pertinent to my investigation. I'm just  
22 communicating with them.

23 Q. Which informants have you called on their  
24 personal cellphones?

25 MR. BECK: Objection, Your Honor,

1 relevance.

2 THE COURT: Overruled.

3 A. Every one of them. I'd have no other way  
4 to get ahold of them.

5 Q. Even if you gave them an FBI phone?

6 A. Yes. I mean, I think Eric Duran is the  
7 only exception to my having to communicate with  
8 somebody over the wire phone. Because Duran was in  
9 the Level 6, and sometimes it was difficult to get  
10 ahold of him. Informants on the street, though, I  
11 would just call them on their phone.

12 Q. Their personal phones?

13 A. Yes.

14 Q. Do you have a list of all of your  
15 informants' personal phone numbers anywhere?

16 A. No.

17 Q. Why not?

18 A. Well, there is no requirement for me to do  
19 so. That would be, I guess, the first answer. And  
20 I've not been asked to.

21 Q. Does your phone contain an address book?

22 A. Yes.

23 Q. Are your confidential informants' phone  
24 numbers contained in that address book?

25 A. Some are. To a man, not one of them has

1 kept the same number throughout the case, though. I  
2 can't think of a single informant who has kept the  
3 same number. Even their wives and girlfriends change  
4 their numbers.

5 Q. Right. So would you call Grace Duran on  
6 her personal cellphone?

7 A. I have, or she's called me, and --  
8 Ms. Duran, we talk about two of them, the younger  
9 one; I've only talked to the older one once. She  
10 changes her phone like clockwork.

11 Q. Going back to Mr. Montoya, would his two  
12 personal cellphone numbers be in your cellphone  
13 address book?

14 A. No. I may have a couple numbers for him.  
15 But, as you're aware, I had some difficulty getting  
16 ahold of him, which resulted in my requesting an  
17 arrest warrant for him for pretrial violations. So  
18 the two numbers that I -- the last two numbers I have  
19 for him, I may still have. But he was unresponsive  
20 to those, and presumably changed his number again.  
21 Mario, Mr. Montoya, would text me or call me from  
22 different numbers all the time.

23 Q. And would that information be on your  
24 cellphone?

25 A. I believe I may have one or two old numbers

1 for him. I don't still have the phone number that I  
2 was communicating with him on in the spring of 2015.

3 Q. Can you preserve that phone, those phone  
4 texts for me, Agent Acee?

5 A. Yes.

6 Q. Thank you.

7 So you talked about the Electronic  
8 Surveillance Unit providing you with a complete  
9 package of phone calls and text messages; correct?

10 A. Correct.

11 Q. And, as we saw the other day, how do you  
12 know if it is a complete package?

13 A. I have no reason to doubt them.

14 Q. Even after yesterday, or the day before,  
15 when we went through Mr. Duran's master text file and  
16 the Cellebrite reports, which are not identical?

17 A. Yes, I still don't have reason to doubt  
18 them. If anything, I need to go back, and I need to  
19 expand on my knowledge of why that occurred. Because  
20 that's not my area of expertise.

21 But I've been involved in a number of  
22 wiretap investigations with the Bureau, or the DEA,  
23 and I've never observed any discrepancies in the  
24 recordings.

25 Q. DDA? What's that?

1 A. The DEA.

2 Q. DEA. Thank you.

3 But, as you saw a couple days ago, there  
4 are discrepancies in at least one cellphone in this  
5 case; correct?

6 A. I don't know that there is discrepancies.  
7 I think there is -- my lack of knowledge on that, I  
8 think it's probably easily explainable. I just need  
9 to talk to the folks who can educate me on that.

10 Q. So the other day I showed you the text file  
11 from the Cellebrite report that your training Agent,  
12 Stemo did, the text messages from the Cellebrite  
13 report that Mr. Bryan did, and the 800-page master  
14 text file. And there is text messages on the  
15 Cellebrite report that aren't on the master text  
16 file; correct?

17 A. I need to take a closer look at them. I'm  
18 not sure. You know, you also pointed out and  
19 Mr. Lowry pointed out that on the Cellebrite reports,  
20 it looks like there is only four or seven text  
21 messages. And we know that that's not true either.  
22 I just don't know that that cellphone has the  
23 capacity -- these are pretty cheap cellphones -- to  
24 have saved 800 calls or text messages. I don't know  
25 that that phone is capable of doing it. So I need to



1 speak with folks from Verizon, as well as our  
2 Electronic Surveillance Unit, to be able to answer  
3 those questions better.

4 Q. Did you have digital evidence training when  
5 you were at the FBI Academy?

6 A. I did.

7 Q. Tell me about that.

8 A. That's part of our seven-month curriculum  
9 while we're there. I had similar training as a  
10 police officer.

11 Q. And in your training, both as a police  
12 officer and with the FBI, they tell you to maintain  
13 original evidence; correct?

14 A. Yes.

15 Q. So a cellphone is original evidence;  
16 correct?

17 A. I think it depends on the circumstances.

18 Q. The FBI, through the Scientific Working  
19 Group on Digital Evidence, they work together, and  
20 they set out standards to -- for all peace officers  
21 and law enforcement officers on digital evidence;  
22 correct?

23 A. I'm not familiar with that organization.  
24 What I can represent is that I have obtained training  
25 on evidence collection that is from that

1 organization.

2 Q. What kind of training?

3 A. As you mentioned, police academies.

4 Following that, I went through a field training  
5 program with a senior officer, and the same sort of  
6 protocols at the FBI.

7 Q. And then, in all those trainings -- since  
8 I've been to them, too -- they tell you to preserve  
9 the original evidence; correct?

10 A. I agree with you.

11 Q. So why didn't you preserve these cellphones  
12 in evidence?

13 A. At the time, I didn't consider the phones  
14 evidence. If the circumstances were different, and  
15 Mario Montoya were the target, then I would. As you  
16 know, I collected, or caused agents to collect  
17 Mr. Garcia's phones.

18 At the time, though, being that he was a  
19 government agent, and that the conversations were  
20 being recorded by the FBI, I didn't consider the  
21 phone itself evidence.

22 Q. Contrary to all the training you've had?

23 A. I don't think that's contrary, no. If I  
24 thought there were evidence on the phone itself --  
25 again, if that -- I'll just leave it at that. If I

1 thought there was evidence on the phone itself, then  
2 I would have collected it and booked it into  
3 evidence. I'll be very honest with you, ma'am. The  
4 reason we have some of the phones is because I simply  
5 put them in my desk to preserve, to reutilize in an  
6 investigation in the future. I didn't consider the  
7 phones evidence at that time.

8 Q. When did Mr. Montoya allegedly back over or  
9 run over his phone, his FBI phone?

10 A. I'd characterize it as sometime between the  
11 takedown and my requesting to meet with him one to  
12 two weeks later.

13 Q. Can you give me a month and year?

14 A. I think it would be December of 2015.

15 Q. Did he tell you right away?

16 A. No, I don't think it came up until I asked  
17 for the phone. I don't know that he thought he was  
18 going to turn the phone back in. We didn't discuss  
19 that.

20 Q. Why not?

21 A. Well, he just kept the phone, presumably,  
22 on a shelf, or in his house, until I told him we had  
23 something going on, or when he was engaged in talking  
24 with Duran or Mr. Garcia or another SNM member.  
25 That's the only time he utilized that phone.

1 Q. You didn't contemporaneously monitor the  
2 activity on that phone?

3 A. No. The activity was captured via the wire  
4 intercept, but I didn't have live monitors on it, no.

5 Q. You don't know, then, what was on that  
6 phone when it was backed over?

7 A. I know what was on the phone between when  
8 the investigation was going on and when I had the  
9 court order.

10 Q. How long was the court order?

11 A. It started on October 26, 2015, and it  
12 terminated on November 25, 2015.

13 Q. So between November 25 and after the  
14 takedown on December 3, you have no way of knowing  
15 what was on that phone?

16 A. I don't. But I also terminated the phone.  
17 Like I pay the bills on the phones.

18 Q. When was it terminated?

19 A. I couldn't tell you off the top of my head,  
20 but the billing cycle usually ends at the end of the  
21 month. So it would have been terminated at the end  
22 of November.

23 Q. You have no idea what was on that phone  
24 from when your wire went down on the 25th of  
25 November, to when it was terminated?

1 A. I don't believe anything was on the phone.

2 Q. Well, yes, but we don't have the phone;  
3 correct?

4 A. We do not.

5 Q. Because you decided to throw it out;  
6 correct?

7 A. I did dispose of it.

8 Q. Did you take a photograph of it before you  
9 disposed of it?

10 A. No.

11 Q. It was original evidence, right?

12 A. You and I are disagreeing on that.

13 Q. Well, we are indeed. But based on your  
14 training at the FBI and the police academy, a  
15 cellphone is original evidence; correct?

16 A. Again, it depends on the circumstances.

17 Q. And in this circumstance, it was the  
18 original evidence; correct?

19 A. I believe the wiretap is the original  
20 evidence.

21 Q. So you said Mr. Montoya likely -- he often  
22 forgot to bring the phone to use during operations;  
23 correct?

24 A. Not often, once or twice.

25 Q. Was he using his personal phone during

1 those operations?

2 A. No.

3 Q. How do you know?

4 A. Because he communicated -- well, one, I  
5 know that on Duran, Duran didn't know he was an  
6 informant. So we caused Duran to get Mario's number.  
7 We also did the same thing with Mr. Garcia. We,  
8 through the informant, informed Mr. Garcia what  
9 Montoya's number was. I instructed Montoya to only  
10 use that phone in communicating with those guys. And  
11 that's what our observations were, and he confirmed.

12 Q. You didn't hear the phone call between Mr.  
13 Montoya and Mr. Baca about destroying the phone  
14 contemporaneously with the conversation, did you?

15 A. No.

16 Q. When did you learn of that conversation?

17 A. After the fact. In reviewing phone calls  
18 for preparation for grand jury.

19 Q. Months after the fact?

20 A. Yes.

21 Q. You didn't take the phone to the tech agent  
22 to see if there was any evidence on the phone to  
23 recover, did you?

24 A. No. Do you mean like the RCFL? The tech  
25 agents wouldn't mess with the phone. They would just

1 help us with the technical aspects of the job. Any  
2 kind of review would have been done by us, the  
3 agents, at the RCFL.

4 Q. What's the RCFL?

5 A. The Regional Computer Forensics Laboratory  
6 in Albuquerque.

7 Q. You didn't do that?

8 A. No.

9 Q. At any time was Mr. Montoya using drugs  
10 when he was working with you?

11 A. No.

12 Q. How do you know?

13 A. Because he was tested regularly.

14 Q. By whom?

15 A. By a couple different entities. U.S.  
16 Probation, us, as well as the trade he was involved  
17 in would test him.

18 Q. What trade?

19 MR. BECK: Objection, Your Honor,  
20 relevance.

21 THE COURT: What's the relevance of that?

22 MS. SIRIGNANO: I just wanted to know who  
23 else was testing him.

24 THE COURT: Well, sustained. We've got the  
25 FBI testing. I think that's what's important.

1 Q. After that phone call between Montoya and  
2 Mr. Baca, did you speak to Mr. Montoya about the  
3 destruction of his cellphone?

4 A. Not in relation to the conversation with  
5 Baca.

6 But, yes, I talked to him about how the  
7 phone got -- like why he's handing me a broken phone  
8 that's leaking battery acid.

9 Q. At the time, in December of 2015, or after  
10 you heard the conversation between him and Baca?

11 A. I didn't question him about his  
12 conversation with Baca. I think he was just going  
13 along with a lot of the things Baca said. I  
14 questioned Mario as to why he was handing me a broken  
15 phone.

16 Q. What did you ask him?

17 A. What the -- you know -- bleep is this?  
18 What did you do to my phone?

19 And he said, you know, sorry. And he  
20 related how he was packing and backed over it with  
21 his RV. He was in a hurry to leave with his family.  
22 And also I think he ran over some of his daughter's  
23 stuff. He was pretty upset about it. I didn't make  
24 any more of a deal about it than that, and just tried  
25 to calm him down and get him on the road.



1 MS. SIRIGNANO: May I have a moment, Your  
2 Honor?

3 THE COURT: You may.

4 Q. One last question.

5 Did you give Mr. Montoya any instructions  
6 or guidelines regarding the use of his personal  
7 cellphones for contacting other SNM members?

8 A. Yes.

9 Q. What were those?

10 A. "Don't use it. Just use the wire phone."

11 MS. SIRIGNANO: Thank you. Pass the  
12 witness.

13 THE COURT: Thank you, Ms. Sirignano.

14 How about any of the other defendants? Do  
15 they have questions of Mr. Acee on Mr. Garcia's two  
16 motions?

17 All right. Mr. Beck, do you have redirect  
18 of Mr. Acee?

19 MR. BECK: Yes, Your Honor.

20 THE COURT: Mr. Beck.

21 REDIRECT EXAMINATION

22 BY MR. BECK:

23 Q. Special Agent Acee, I think you testified  
24 on cross-examination that you engaged in phone calls  
25 with cooperators on their personal cellphones?

1 A. Yes.

2 Q. Did you talk in substance about any of the  
3 defendants in this room?

4 A. No.

5 Q. Did you talk with them about any  
6 exculpatory information in those phone calls with the  
7 cooperators?

8 A. No.

9 Q. What were those phone calls with the  
10 cooperators about?

11 A. Mostly: Be here on this day at this time,  
12 and this is where we're meeting.

13 Q. Did you also check in with them if you were  
14 supervising them?

15 A. Yes. They had to check in with me daily.  
16 So those communications would start in the morning.

17 Q. And the same questions with those  
18 communications. Did you talk to them in those  
19 communications substantively about the defendants in  
20 this room?

21 A. No. Those conversations were solely me  
22 fulfilling my duties as performing their pretrial  
23 supervision.

24 Q. You talked with Ms. Sirignano about Duran's  
25 cellphone. Do you remember that?

1 A. Yes.

2 Q. Was that cellphone also -- was there also a  
3 wiretap on that cellphone?

4 A. There was.

5 Q. Were the phone calls and text messages on  
6 that cellphone recorded and preserved pursuant to  
7 that wiretap?

8 A. Yes, sir.

9 MR. BECK: Nothing further, Your Honor.

10 THE COURT: Thank you, Mr. Beck.

11 All right. Mr. Acee, you may step down.  
12 Thank you for your testimony.

13 Mr. Beck, is the Government going to have  
14 any further witnesses or evidence?

15 MR. BECK: That's all we have, Your Honor.

16 THE COURT: Mr. Keefe, do you know if Mr.  
17 Montoya is here yet?

18 MR. KEEFE: Your Honor, I haven't been  
19 notified by the marshals whether he's arrived. I  
20 think they said it would be about an hour when we  
21 were downstairs.

22 THE COURT: Okay.

23 MR. ADAMS: Judge, may I step out very  
24 briefly, two minutes?

25 THE COURT: Yes. Well, if there is nothing

1 else we can do on this motion, let me ask --

2 Mr. Keefe, did you have something?

3 MR. KEEFE: Your Honor, I just would ask,  
4 if we could have a few minutes to speak with Mr.  
5 Montoya when he does arrive. We'd just ask for a few  
6 minutes to speak with Mr. Montoya when he does  
7 arrive.

8 THE COURT: Okay.

9 MR. ADAMS: Judge, obviously we have -- the  
10 rule has been invoked for all evidentiary hearings.  
11 It's certainly appropriate for a lawyer to meet. We  
12 just don't want the prep to involve anything that was  
13 related to Special Agent Acee.

14 THE COURT: You would agree with me,  
15 Mr. Keefe, that even though you've been in the room,  
16 and everybody agrees you should be in the room,  
17 you'll not be a conduit for passing on to Mr. Montoya  
18 what occurred here today?

19 MR. KEEFE: Yes.

20 THE COURT: Thank you, Mr. Keefe.

21 All right. If there is nothing more we can  
22 do on those two motions of Mr. Garcia, is there  
23 anything else people were thinking about overnight;  
24 had a couple of things that I relayed to you this  
25 morning. Is there anything else that people thought

1 about that you need rulings on, evidentiary rulings,  
2 wanted to talk about these issues? Mr. Villa?

3 MR. VILLA: Your Honor, I just had a  
4 thought, and you probably have thought about this. I  
5 know you said yesterday that you hadn't finished  
6 considering the courtroom setup. But if the five  
7 defendants in trial are to be shackled, I'm just  
8 wondering where they're going to sit so that the jury  
9 doesn't see that. If they're sitting in a circle, I  
10 think the shackles will get revealed. I'm just  
11 curious --

12 THE COURT: I'm fairly confident -- I don't  
13 want to talk about how they're going to be set up  
14 right at the moment, but I'm fairly confident that  
15 we're going to have them positioned in a way so that  
16 no jurors are going to be able to -- the voir dire --  
17 after that, it gets kind of simple -- but during voir  
18 dire that anybody will see shackles. You can talk to  
19 Ms. Wild about it, if you want to go into detail, but  
20 I don't want to get into great detail here on the  
21 record on it.

22 MR. VILLA: I understand that, Your Honor.  
23 You know when it might be set up? So, for instance,  
24 if we're here the week prior, we just want to get a  
25 look at it maybe before Monday?

1 THE COURT: Ms. Wild, are you on the phone?

2 Ms. Wild, are you on the phone? Talk to Ms. Wild  
3 about that. I think she'll be able to provide that  
4 information to you.

5 THE CLERK: I am.

6 THE COURT: Hold on just a second. I'm  
7 talking to Ms. Standridge. One second here.

8 (A discussion was held off the record.)

9 THE COURT: All right. Have you been  
10 listening, Ms. Wild?

11 THE CLERK: No, Judge, I haven't been able  
12 to hear anything.

13 THE COURT: Okay. The question on the  
14 table is from Mr. Villa, and he's asking about -- he  
15 had two things. He had some questions about the  
16 actual setup here in the courtroom. And I said that  
17 we were confident, that we had looked at enough  
18 arrangements that the jurors would not be able --  
19 during voir dire and I think it will be a lot easier  
20 after voir dire -- we're confident we can make  
21 arrangements so that the jurors and the venire cannot  
22 see any of the shackles that the defendants are going  
23 to have on their feet, and that's correct; correct?

24 THE CLERK: Correct.

25 THE COURT: And Mr. Villa also wanted to

1 know what that arrangement was going to look like.  
2 And I said we had not quite decided, but we were  
3 confident that it was going to work out. But that we  
4 didn't want to put anything right on the record right  
5 at the moment. And that he and others could talk  
6 directly to you about that. Do you want to deviate  
7 from that answer in any way?

8 THE CLERK: Not at this time.

9 THE COURT: All right. Then here -- and  
10 this is what Ms. Standridge is telling me, so if you  
11 have a different view or want something different,  
12 let me know. Next week this room is going to be out  
13 of service because they're going to be upgrading some  
14 of the technology here. I don't know if it's the  
15 microphones or things, but it's going to be out of  
16 service. And they're going to be putting in some  
17 upgrades. So starting the 22nd, that's when the  
18 reconfiguring of this courtroom is going to take  
19 place. It will take place on the 22nd, 23rd, and  
20 probably most of the 24th. You probably can come in  
21 here on the 24th and look at it, and get a pretty  
22 good sense of what we're going to be using. You  
23 certainly will be able to see it on the 25th and  
24 26th. Because we're going to be, you know, doing  
25 some test runs to make sure we don't have any

1 glitches on the 29th. So is that responsive?

2 MR. VILLA: Yes, Your Honor. I think that  
3 works, because we've got to get the clothes to the  
4 marshals at that time. So it's good timing.

5 THE COURT: Anything you want to add to  
6 that, Ms. Wild?

7 THE CLERK: I can't hear what was said.

8 THE COURT: You couldn't hear what I said?

9 MR. VILLA: I heard what you said -- oh,  
10 what you said? What I'd like to be able to do is get  
11 out a diagram to them so they have an idea that  
12 doesn't require necessarily viewing the courtroom in  
13 person. And I hope to have that out by early next  
14 week.

15 THE COURT: Okay. And all Mr. Villa said  
16 in response to what I said, if you heard what I said,  
17 he said that would work for them because they're  
18 going to have to get clothes to the marshals for the  
19 defendants about that same time anyway.

20 THE CLERK: Okay.

21 THE COURT: All right. Anything else? Any  
22 other questions?

23 MR. VILLA: Thank you, Ms. Wild.

24 THE COURT: Comments?

25 MR. ADAMS: Judge, I have one issue --



1 THE COURT: Mr. Adams.

2 MR. ADAMS: -- since we're just jumping in  
3 and adding stuff.

4 What I had heard from Special Agent Acee is  
5 that he was in communication with the cooperators on  
6 their personal cellphones through text messages and  
7 through oral calls that, to my hearing -- and I'm a  
8 little jaded -- but it seemed, by design, to not  
9 leave a paper trail. We have asked -- and I've  
10 discussed this with my brothers and sister at counsel  
11 table -- I've asked if any of this has been provided  
12 to us by way of Rule 16 or Brady or anything else.  
13 We think the motivations and instructions or the prep  
14 that was given to various cooperators before  
15 individual conversations, or how they were coached up  
16 to elicit discriminating statements, would be very,  
17 very, very critically important for the trial.

18 They told me they would look into this  
19 more; that they don't believe any of that has been  
20 preserved; and that they don't believe any has been  
21 turned over. But they'll look into that. I  
22 anticipate this will be an issue that we'll be going  
23 into at great length at the trial. So I just want to  
24 put it on your radar, that if nothing is preserved,  
25 then they can't turn it over. But we're not pleased

1 with it. If items were preserved, then I think  
2 they're going to work double-time to get it to us.  
3 And we'll follow up with whatever will be appropriate  
4 if they do find something.

5 THE COURT: All right. And you've been  
6 talking to Mr. Beck about that?

7 MR. ADAMS: Mr. Beck and Mr. Castellano and  
8 Ms. Armijo.

9 THE COURT: Is that y'all's understanding  
10 as well, you'll look into it?

11 MR. BECK: Yeah, that's accurate, Your  
12 Honor.

13 THE COURT: Okay. Anybody else? Any other  
14 evidentiary issues? Mechanics? Anything else we  
15 need to discuss, want to discuss? Mr. Lowry?

16 MR. LOWRY: Well, Your Honor, just a few.

17 Your Honor, over the last -- well, Monday,  
18 we heard from Mr. Del Valle -- and he's not here --  
19 but we anticipate calling Grace Duran as a witness in  
20 this case. And his dual representation in the same  
21 matter of Grace Duran and Eric Duran is going to  
22 cause some problems. So we anticipate filing a  
23 motion to conflict him out of Grace Duran's  
24 representation. So I just want to give you a  
25 heads-up we're working on that now.

1 THE COURT: Ms. Wild, maybe you know  
2 something about this. Did Mr. Del Valle, did he  
3 start representing Grace Duran after we appointed him  
4 to be the CJA lawyer, and he picked it up as  
5 additional representation? It's not part of our CJA  
6 appointment, is it?

7 THE CLERK: It is not.

8 THE COURT: So this is just something he  
9 picked this up on his own?

10 THE CLERK: I would have to presume.

11 THE COURT: Okay.

12 MR. LOWRY: Having just gone through all  
13 the conflict rules, I'm pretty familiar with them. I  
14 would think that the dual representation in the same  
15 matter, where they have potentially -- well, not  
16 potentially, in my view, but divergent interests --  
17 would be inappropriate, Your Honor. So I just want  
18 to bring that to the Court's attention.

19 There is one other matter -- it's a little  
20 premature, but since the Court is inquiring, I just  
21 want to get it out there -- you know, in state court,  
22 where I practice a bit, there is procedural mechanism  
23 for the defense to file for witness immunity. And I  
24 was discussing this with some of my colleagues last  
25 night. This is something we're considering doing in

1 preparation for the trial. We've communicated -- and  
2 I don't want to get into the identities yet -- with a  
3 few people who have relevant and material  
4 information, yet we're running into the obvious  
5 problems where witnesses really don't want to get  
6 subpoenaed or come in, because they're afraid that  
7 they're going to be invited into the next RICO  
8 prosecution, if they were to testify for the defense,  
9 Your Honor. So I'll work with my colleagues on that.  
10 But I just didn't know if the Court had any thoughts  
11 or inclinations we should be addressing when  
12 researching and drafting these kinds of motions?

13 THE COURT: Well, I certainly don't mind  
14 being educated on it. But if the Government is not  
15 prepared to grant immunity to somebody, I don't think  
16 there is anything I can do, or the defendants can do  
17 to give immunity. Do you?

18 MR. LOWRY: Well, I know in New Mexico  
19 courts they found it to be a due process violation to  
20 basically tie the hands of the defense from material  
21 witnesses in the case. But that would be the nature  
22 of the argument. But, obviously, I'm just here to  
23 plant a flag, so to speak, so the Court knows what  
24 I'm thinking, where we're heading. But I look  
25 forward to educating you on that, and we are going to

1 work mightily to do that.

2 THE COURT: My impression is that is very  
3 different in state court than it is in federal court.  
4 It basically rests in the discretion of the  
5 Government to grant or deny immunity.

6 MR. LOWRY: That's my -- as I stand before  
7 you right at this moment, Your Honor, that's my  
8 essential understanding as well.

9 THE COURT: They can play some pretty hard  
10 ball.

11 MR. LOWRY: And they are. And we expect  
12 them to play some pretty hard ball. But, if you look  
13 at the Berger Standard, they're fair to strike hard  
14 blows, but not foul ones. And we can argue about  
15 whether that's foul a blow or not. But, if nothing  
16 else, we'll be reducing that to paper and litigating  
17 and reserving it for an appellate issue. I mean, it  
18 may be time for the federal courts to mimic state law  
19 on this issue.

20 THE COURT: Okay. Don't get optimistic  
21 about that.

22 MR. LOWRY: Your Honor, I'm a criminal  
23 defense lawyer because I'm an optimist.

24 THE COURT: You are an optimist, or not an  
25 optimist?

1 MR. LOWRY: I am.

2 THE COURT: All right. Ms. Armijo?

3 MS. ARMIJO: Your Honor, we did think of  
4 something last night that -- and I have not brought  
5 it up, but I'll bring it up now -- when we were  
6 talking about 609, I believe the agreement was that  
7 the defense was not going to have to provide the  
8 United States with written notice of what they  
9 believe -- impeachable material on our witnesses, and  
10 vice versa.

11 We've had a couple of cooperators testify  
12 that have pending charges, and I -- we did not agree,  
13 of course, to them extending past 609 to things like  
14 impending charges. So I guess I am putting it out  
15 there that we would oppose, and would ask for a  
16 pretrial ruling on anything that our cooperators --  
17 that are pending charges that are not part of their  
18 cooperation; for instance, Mr. Duran's felon in  
19 possession case. Before he testifies, I think it  
20 needs to be ironed out what, if anything, can be  
21 talked about that. Or Mr. Montoya, I'm sure the  
22 defense will try get into it today, but I know the  
23 United States would be objecting, and his attorneys  
24 as well, as to his pending Colorado case.

25 So before it's just brought out in front of

1 the jury, I think that with each witness we probably  
2 need to decide that issue. And certainly, I wouldn't  
3 expect anyone in opening statements to be saying.  
4 "You will hear from Mr. Duran who was arrested," et  
5 cetera, et cetera, et cetera. Because that is --  
6 although they will be arguing that is impeachment --  
7 it's not 609, we have not had any notice of that, and  
8 it should be something that the Court rules on ahead  
9 of time.

10 THE COURT: Well, if it's not 609, then,  
11 what is it that kicks us into --

12 MR. ADAMS: I think it's straight motive  
13 and bias, and completely fair game, and fair game for  
14 opening statements. It's not the Government's  
15 intention with the witness. It's the witness' mental  
16 state that's subject to attack, and broad attack, and  
17 vicious attack, if we have the goods to do it. And  
18 new pending charges are certainly fair game for that.

19 THE COURT: Well, I guess my analysis would  
20 be slightly different than Mr. Adams. But it would  
21 be that, given the package of benefits that these  
22 cooperating people are getting, some of which is  
23 ongoing, and maybe the resolution of ongoing criminal  
24 charges, isn't it fair game for the defendants to get  
25 into pending charges against the cooperating

1 defendants, to explore whether they are going to  
2 receive some benefit from the Government for their  
3 cooperation?

4 MR. BECK: I think --

5 THE COURT: That's not a 609 issue. I  
6 don't see pending charges -- correct me if I'm  
7 wrong -- but I don't see pending charges being a 609  
8 issue. It is the basket of credibility, I guess, is  
9 what I would --

10 MR. BECK: I think that's right, Your  
11 Honor. I think that is proper fodder for  
12 cross-examination and impeachment evidence.

13 I think the United States' concerns for  
14 someone like Duran or Mr. Montoya who are facing  
15 criminal --

16 THE COURT: Are you worried about their  
17 Fifth Amendment issues?

18 MR. BECK: Exactly. That's our concern, is  
19 that -- you know, I don't think it's relevant to get  
20 into exactly the nuts and bolts of what happened, and  
21 it treads upon their Fifth Amendment rights. They  
22 can say there are pending charges, they're  
23 unresolved; they can get into whether they expect  
24 that they'll gain some benefit in those cases from  
25 testifying for us in this case.



1 But I think Rule 403 would limit them from  
2 going into cross-examination that would elicit  
3 incriminating information.

4 MR. CASTLE: Your Honor, if I could address  
5 this briefly?

6 THE COURT: Let me get Ms. Duncan, then  
7 I'll come back to you, Mr. Castle.

8 I mean, it would seem to me that that would  
9 probably be the appropriate line. We don't want to  
10 get these guys in more criminal trouble and violate  
11 their rights.

12 Let's see, with Mr. Duran we're going to  
13 have Mr. Del Valle there. He can sit over here and  
14 help draw that line.

15 We've got Mr. Keefe for Mr. Montoya. I'm  
16 going to have to refresh my memory about Mr. Cordova.  
17 Is he pretty clean?

18 MR. VILLA: Mr. Samore.

19 THE COURT: That's right. Mr. Samore was  
20 here. Okay. So they're going to have attorneys.

21 Let me ask this: I mean, if we've got an  
22 attorney here -- Mr. Beck, Ms. Armijo, if we've got  
23 an attorney here, and we go too far, don't we have  
24 the protections in place so that their Fifth  
25 Amendment rights are not going to be abused by this

1 process?

2 MR. BECK: I think that is the safeguard in  
3 place, yeah.

4 THE COURT: So then what is the concern,  
5 then about, either in opening statements or in  
6 cross-examination of the defendants here, going full  
7 bore against the cooperating witnesses? It seems to  
8 me that it's going to all be subject to maybe a  
9 relevancy objection, 403 or something like that. If  
10 people go too far, you know, I just may cut it off  
11 after they make their point that the person is  
12 getting benefits, have received benefits, and may get  
13 benefits in the future, even for future criminal  
14 activity. After they've sort of made their point, I  
15 may start saying: We've seen enough. But don't we  
16 have in place the mechanism so that they can go ahead  
17 and bring these things out in openings if they need  
18 to?

19 MR. BECK: I think we do. I think we just  
20 got jealous of all the defense attorneys piling stuff  
21 on that you should be aware of at trial, and wanted  
22 to pick one for ourselves. I think you're right,  
23 Your Honor.

24 THE COURT: All right.

25 MS. ARMIJO: Your Honor, I think the issue

1 is if the witness is not allowed to say the details  
2 of what they copped to, the defense attorneys know  
3 that, then in opening statements they can't get into  
4 the fact -- for instance, the child abuse charge that  
5 is not a charge -- that was not -- that was  
6 unfounded -- they can't be able to get up here and  
7 start talking about -- or the felon in possession  
8 details. We would ask in opening statements, until  
9 it is determined by the Court, that they can't get  
10 everything out, knowing full well that there will be  
11 objections as to that, and the Court may limit them  
12 based on a Fifth Amendment right. That's the concern  
13 about opening statements.

14 Closings are obviously going to be  
15 different, because the evidence will be in. But if  
16 there is something that they know that will be  
17 sustained by this Court -- and I agree that the fact  
18 that there are pending charges -- but there are other  
19 things that this Court may prevent them from getting  
20 into. And that is what we are concerned about in  
21 opening statements.

22 THE COURT: Well, give me -- let's try to  
23 be concrete here. What is it that you're concerned  
24 with your three big cooperators here? What are you  
25 thinking of that they're going to do? And maybe I

1 can just rule.

2 MS. ARMIJO: Well, Billy Cordova is not  
3 facing any charges.

4 THE COURT: He's pretty clean.

5 MS. ARMIJO: He doesn't have anything. So  
6 there are no concerns with Billy Cordova.

7 Mario Montoya has his pending cases -- and  
8 I would have to consult with Mr. Keefe to get into  
9 exactly what they would want to -- allow to get into.  
10 But he does have, I believe it's a car theft charge  
11 and a misdemeanor that's pending in Colorado.

12 Eric Duran has more -- his are not even  
13 charged at this point. And so there is the felon in  
14 possession of possible heroin, that would be a  
15 misdemeanor over there. And then they've made  
16 allegations about -- there is a report on child  
17 abuse, but it was unfounded by the state, as far as  
18 we know. I see Ms. Duncan, who may share more light  
19 on that right now.

20 But these are the sort of things that  
21 before opening statement, if there is a Fifth  
22 Amendment right to, and it's going to be blocked out,  
23 the details of it, then they shouldn't be able to go  
24 into it in opening statements.

25 THE COURT: Well, this is what I propose to

1 do -- and I'll hear from Mr. Castle and Ms. Duncan --  
2 but here's what I propose to do: The Government  
3 identify exactly what you don't want the defendants  
4 to go into on opening and in cross without coming up  
5 to the bench. And then I can make a call. Right at  
6 the moment, I'm not seeing or hearing anything that I  
7 can really tell the defendants they can't go there.  
8 I might need to be refreshed on the child abuse  
9 charges. Were they dismissed? Did they turn out  
10 they didn't exist? But right at the moment, without  
11 more information, I'm not going to make any ruling  
12 that they're precluded from going into anything. But  
13 I'll reconsider it, if the Government focuses on a  
14 specific charge or something like that.

15 All right. Ms. Duncan?

16 MS. DUNCAN: Your Honor, I think the  
17 approach that you're proposing is the right one, and  
18 for us to know exactly what it is that the Government  
19 doesn't want us to get into.

20 But I think that these charges are relevant  
21 for the package of benefits they're getting from the  
22 Government. And with respect to Mr. Duran, you heard  
23 him testify that he was cooperating with the  
24 Government out of the goodness of his heart and to  
25 give back to the community. And the way he's giving

1 back to the community is by slapping a 10-year-old  
2 girl, possessing heroin and a firearm, and I think  
3 also some forgeries, and an attempted breaking and  
4 entering. So this is all classic cross-examination  
5 fodder bearing on Mr. Duran's credibility. And I  
6 think under the Sixth Amendment, we are entitled to  
7 introduce that.

8 But, again, I think it would be helpful to  
9 know exactly what the Government is objecting to, and  
10 then we can respond to that to provide the Court with  
11 the basis for including that evidence.

12 THE COURT: All right. Well, let's try to  
13 get more specific before I start precluding. Right  
14 at the moment, though, the ruling is everything is  
15 fair game for the defendants on charges.

16 I would ask the defendants to help me out.  
17 Y'all are defense lawyers, too. Help me out to  
18 protect these guys' rights. You know, they're facing  
19 criminal charges. I don't want them coming in and  
20 incriminating themselves.

21 Mr. Castle.

22 MR. CASTLE: Judge, I'm raising a couple of  
23 thoughts while we're here. And we'll respond in  
24 writing once we see a motion in limine from the  
25 Government, which I note is past due by significant

1 weeks.

2 THE COURT: They can just raise it orally  
3 before we get out of here today. If they talk with  
4 Mr. Keefe or something, and come up. Maybe we can  
5 resolve these before we even leave here today.

6 MR. CASTLE: Judge, there are two Supreme  
7 Court cases I think are relevant. One is Davis  
8 versus Alaska. I don't have the cite. But it was  
9 back in 1974. That was a case in which the  
10 witness -- the defense sought to cross-examine a  
11 witness on the fact that he had a pending probation  
12 revocation, and that the witness might be wanting to  
13 cooperate with the Government in order to curry favor  
14 in his probation revocation. Obviously, you have  
15 Fifth Amendment rights in a probation revocation  
16 matter as well. And the United States Supreme Court  
17 said it was error for the court to restrict  
18 cross-examination into the pending probation  
19 revocation.

20 THE COURT: And why were those relevant in  
21 that case?

22 MR. CASTLE: Motive and bias.

23 The second concept is, aside from motive  
24 and bias, the defense is entitled to question and  
25 impugn the nature of the investigation and the

1 handling by the Government of the case. And the fact  
2 that they're letting people out, letting them prey  
3 upon the public, will certainly impugn the nature of  
4 this investigation. And that was recognized as a  
5 legitimate defense method in the case of Kyles versus  
6 Whitley, and the Supreme Court indicated that it was  
7 a legitimate defense tactic to do that.

8 Now, these witnesses aren't going to be  
9 actually unprotected. Let's assume for a moment they  
10 have a Fifth Amendment right. The fact is they're  
11 being compelled to come in and testify; they're  
12 required to do so through the use of subpoena power.  
13 And because of that, I would bring a third case to  
14 the Court's attention, Garrity versus New Jersey, 87  
15 Supreme Court 616. And in that case, the Supreme  
16 Court found that compelled testimony, in essence,  
17 acts almost as an immunity for the witness because  
18 it's an involuntary statement. And the only thing  
19 that's not protected there is that they're not  
20 protected from charges of perjury, if they lied on  
21 the stand about that pending matter.

22 And the Supreme Court has said numerous  
23 times that you do not have a Fifth Amendment right to  
24 perjure yourself. So when they take the stand, and  
25 they get up there and they're examined and they claim



1 the Fifth, that's an empty claim, because they're not  
2 actually exposed to any criminal exposure other than  
3 the fact that they perjure themselves on the stand.  
4 So I think this is all -- I'm sorry, the word hooey  
5 is in my mind right now.

6 But I think if they brief it and they look  
7 into this, and they actually file a motion in limine,  
8 they're going to come to the conclusion that their  
9 arguments will fail.

10 And so I just bring those matters to the  
11 Court and the Government's attention, because I think  
12 it might lead them to withdraw their thoughts in that  
13 regard.

14 THE COURT: All right. Thank you, Mr.  
15 Castle.

16 Mr. Castellano.

17 MR. CASTELLANO: Your Honor, I hear what  
18 the defense is saying. And I understand the basis  
19 for the impeachment. I think the distinction will be  
20 the fact of a charge or the fact of a probation  
21 violation, those are fair game, as well as any  
22 expectation the person thinks they may receive as a  
23 result of being charged and cooperating.

24 I think what the defense will not be  
25 allowed to do is elicit a line of questions which are

1 all designed to get the witness to invoke the Fifth  
2 in front of the jury. I think that would be  
3 improper. So if they get the police report and start  
4 going through every fact to ask the person whether or  
5 not it's true, or whether or not that's the  
6 allegation, and the person continuously invokes the  
7 Fifth, I think that's where the problem lies. And so  
8 we understand the fact of a charge. But, like I  
9 said, a line of questions designed to make them say  
10 nothing more than, "I invoke the Fifth," is going to  
11 be the problem. So we'll look into that further.

12 THE COURT: All right. I will look into  
13 Mr. Castle's case. I guess I'm not excited about --  
14 I guess I don't see what the relevance of it, even if  
15 you can do it, I don't think it's very relevant to  
16 get into the facts of those cases. I think you can  
17 get into the charges, and if the Government is taking  
18 care of matters and stuff like that. But I probably  
19 am going to start shutting down, because I'm just not  
20 sure how that's relevant to the issues in this case.

21 All right? Anything else we need to  
22 discuss? Want to discuss?

23 MS. HARBOUR-VALDEZ: Your Honor, I just  
24 want to put on the record that Mr. Burke left to take  
25 a flight back to Denver.

1 THE COURT: All right. Okay. Anything  
2 else you want to discuss? Comments? Suggestions?  
3 Need evidentiary rulings, rulings on?

4 All right. Did you have anything, Mr.  
5 Adams? Are you just standing there?

6 MR. ADAMS: I was just standing.

7 THE COURT: All right. Why don't we go  
8 ahead and take our break, and see if we can get Mr.  
9 Montoya on after we take our break.

10 (The Court stood in recess.)

11 THE COURT: All right. We'll go back on  
12 the record. Looks like we've got everybody in the  
13 courtroom, everybody has got an attorney.

14 I did have a chance to look at Garrity,  
15 because it just didn't have the right feel to me.  
16 And I don't agree -- I don't have the same reading of  
17 it as Mr. Castle does. In that case, Justice Douglas  
18 was dealing with a statute from New Jersey that  
19 warned each -- I think they were police officers --  
20 that, one, anything that he said might be used  
21 against him in any state criminal proceeding; two,  
22 that he had the privilege to refuse to answer, if the  
23 disclosure would tend to incriminate him; but  
24 three -- and I think this is the source of the  
25 compulsion, not the subpoena -- that if he refused to

1 answer, he would be subject to removal from office.  
2 And the Justice Douglas says, "The choice given  
3 petitioners was either to forfeit their jobs or  
4 incriminate themselves. The option to lose their  
5 means of livelihood or to pay the penalty of  
6 self-incrimination is the antithesis of free choice  
7 to speak out or remain silent. That practice, like  
8 interrogation practices, we reviewed in Miranda, is  
9 likely to exert such pressure upon an individual as  
10 to disable him from making a free and rational  
11 choice. We think the statements were infected by the  
12 coercion inherent in this scheme of questioning, and  
13 cannot be sustained as voluntary under our prior  
14 decision."

15 So I don't think the fact that they're  
16 under subpoena means that they've been granted some  
17 sort of quasi-immunity or something in trial. So I'm  
18 still going to be vigorous in protecting the  
19 cooperators' Fifth Amendment rights. And Washington  
20 v. Davis -- that case was one in which the judge  
21 prohibited any -- going into any of the issues about  
22 probation or supervised release. I think we're well  
23 beyond that. But even that case seemed to recognize  
24 that the court could impose some limits on how much  
25 questioning could be done of the -- I think there, it

1 was an eyewitness rather than a cooperating witness.  
2 So there may be -- you know, recognized there were  
3 limits that the court could impose as well. So  
4 unless somebody tells me otherwise, I'm going to be  
5 vigorous in protecting the cooperators' Fifth  
6 Amendment rights as well.

7 All right. I understand we have Mr.  
8 Montoya. So, are you going to call him, Mr. Adams?  
9 Mr. Armijo?

10 MS. ARMIJO: He was meeting with his  
11 attorneys. And I don't know if he's still downstairs  
12 or not. But he is in the building and they can bring  
13 him up.

14 THE COURT: All right.

15 MR. VILLA: Your Honor, with respect to  
16 Garrity, we're not just talking about a witness who  
17 is being subpoenaed to testify because they're a  
18 percipient witness or something like that. These  
19 folks have cooperation agreements with the United  
20 States. Many of them have 5K agreements, or other  
21 implicit agreements, like we heard about with Mr.  
22 Cordova, where he wasn't going to get indicted on  
23 RICO if for his cooperation. And they risk losing  
24 these agreements if they don't testify. So it's not  
25 because they're being subpoenaed here to court. It's

1 because they fear, like the officers in Garrity  
2 feared losing their, not job, but losing their  
3 agreement with the United States. And perhaps we can  
4 do some more research on it and look into that. But  
5 it's something to think about when we get to this  
6 issue at trial.

7 THE COURT: Well, I guess I just am not  
8 seeing the issue. I mean, Garrity is a case about  
9 voluntariness of statements. I don't think there is  
10 going to be any question, when they come into court,  
11 they're going to be -- their statements are going to  
12 be voluntary. I mean, yes, somebody may put them  
13 under subpoena, the Government may produce them. I  
14 don't know exactly how they're going to get here, but  
15 we're not going to be questioning the voluntariness  
16 of the statements. Y'all may, on cross-examination,  
17 but they're not going to be constitutionally  
18 questioned, in the sense that we're going to toss  
19 their statements out, or not allow their statements  
20 to be used against them.

21 I think, down the road, if they say  
22 something incriminating in this court, I think they  
23 could be prosecuted, and that statement could be used  
24 against them. Don't you?

25 MR. VILLA: Well, I guess that's what I'm

1 thinking about with respect to Garrity. I know in  
2 the present day context to say a police officer is  
3 under investigation, they have them read the Garrity  
4 warning before they make a statement about it. If it  
5 happens to be an investigation that could lead to  
6 criminal charges, I think -- though I don't know --  
7 that there could be -- they could prevent that  
8 statement from being used against them in court,  
9 because they gave it under the threat of losing their  
10 job if they didn't give the statement to internal  
11 affairs or that sort of thing. In this context,  
12 that's what I'm thinking about; they have this threat  
13 of losing their 5K deal, or whatever their  
14 cooperation agreement is with the Government.

15 THE COURT: I have just never seen Garrity  
16 extended that far.

17 MR. VILLA: I'm not sure I have either.

18 THE COURT: So y'all are going to have some  
19 work to do to convince me that these men lose their  
20 Fifth Amendment rights by coming in here and  
21 testifying; that they cannot incriminate themselves  
22 and have statements that they make under oath in this  
23 court not be used against them.

24 I'll certainly listen.

25 MR. VILLA: Well, we'll do some research.

1 THE COURT: I don't think it's going to be  
2 a problem. Because by the time y'all start -- if you  
3 really are going to take a police report and go  
4 through it, and say: Did you do this, do that, I  
5 probably am not going to allow it, because I don't  
6 see any relevance to that.

7 MR. VILLA: Well, I understand the Court  
8 limiting us in that fashion. But, you know, some of  
9 the things that took place yesterday when Mr. Del  
10 Valle objected on Fifth Amendment grounds for  
11 Mr. Duran, I think, you know, he might want to object  
12 sooner than the Court is willing to make us stop  
13 asking questions. And --

14 THE COURT: Could be.

15 MR. VILLA: But we'll look into that, Your  
16 Honor.

17 THE COURT: Okay. I think y'all are going  
18 to get to make your point. I think the point's going  
19 to be pretty obvious to the jury that these guys are  
20 getting benefits. And I'm not interested in trying  
21 to keep you from making that point. It's just, you  
22 know, maybe it doesn't have to be made with all the  
23 details of those crimes in a way that gets him to  
24 have to make incriminating statements. That's  
25 probably where I'm going to draw the line.



1 MR. ADAMS: Judge, may I chime in on this?

2 THE COURT: Sure.

3 MR. ADAMS: My observation is a little bit  
4 different than Mr. Villa's. I don't think the  
5 witness has to testify at all. And they could choose  
6 to invoke the Fifth and not testify at all. If they  
7 want to testify for the Government, and they subject  
8 themselves to the adversarial system at that point, I  
9 think you're completely correct, that if a report is  
10 brought out, and it's gone through line by line, and  
11 the purpose of the report is that a police officer  
12 thinks you did this, maybe it's not admissible. But  
13 if the point of that is -- and this is part of what  
14 you were facing, and this is part of the package, and  
15 this is part of your motivation for testifying, and  
16 this is why you're doing this, it's completely  
17 relevant. Just like, if I had a federal sentencing  
18 with somebody, and we got new charges somewhere else  
19 that weren't subject to conviction, I would be going  
20 over all those records very closely with my client,  
21 saying like, We've got to deal with this at your  
22 sentencing. It's relevant, it's relevant to how the  
23 court is going to view you. For that same reason, I  
24 think it's relevant for the jurors to get the  
25 complete picture, and not some artificially narrowed

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1 picture, as it relates to the witness' mindset and  
2 their bias.

3 THE COURT: Well, I think charges and  
4 stuff, you can probably go into. But you can't get a  
5 situation where he's going to maybe make  
6 incriminating statements against him.

7 All right. Mr. Montoya, if you'll stand up  
8 again, and raise your right hand to the best of your  
9 ability there, Ms. Standridge, my courtroom deputy,  
10 will swear you in.

11 MARIO MONTOYA,  
12 after having been first duly sworn under oath,  
13 was questioned and testified as follows:

14 DIRECT EXAMINATION

15 THE CLERK: Please be seated. State and  
16 spell your name for the record?

17 THE WITNESS: Mario Monday. M-A-R-I-O,  
18 M-O-N-T-O-Y-A.

19 THE COURT: Mr. Montoya. Mr. Adams.

20 MR. ADAMS: Thank you, Your Honor.

21 BY MR. ADAMS:

22 Q. Mr. Montoya, were you given a phone by  
23 Special Agent Acee?

24 A. Yes, sir.

25 Q. When was that?

1           A.    I think it was between October and November  
2   of 2015, '14.

3           Q.    Why did he give you a phone, to your  
4   knowledge?

5           A.    Because these guys right here were supposed  
6   to call me from prison and ask me to kill Gregg  
7   Marcantel, head of the gang unit, and a couple of  
8   other guys involved in the case, also "Chuco," Mandel  
9   Parker, and it was supposed to be recorded.

10          Q.    Why do you believe -- who told you they  
11   were supposed to call you from prison about Gregg  
12   Marcantel?

13          A.    The agents.

14          Q.    So, in October of 2015, you had not heard  
15   anything at all about being called or put in any sort  
16   of action against Gregg Marcantel?

17          A.    I was aware before I left prison that  
18   people were talking about stuff like that.

19          Q.    All right. When did you leave prison?

20          A.    I don't remember the exact date. It's been  
21   a while. I had a lot going on in my life at that  
22   time.

23          Q.    Was it 2015?

24          A.    No.

25          Q.    2014?

1 A. 2014, or before --

2 Q. All right.

3 A. -- I believe.

4 Q. And there was talk about doing something  
5 crazy back at that time, when you were still in  
6 prison?

7 A. Yeah.

8 Q. Was Gregg Marcantel's name mentioned as  
9 part of that?

10 A. Most of the time, yeah.

11 Q. All right. Who said it?

12 A. Who didn't?

13 Q. All right. Well, my question is: Who said  
14 it?

15 A. That's a long list.

16 Q. Give me the list. We'll start at the top.

17 A. "Shadow," "Pup," "Fernie," "Krazo."

18 Q. "Crazo" being Eric Duran?

19 A. I think it was the other "Krazo," actually.  
20 I don't know his name.

21 Q. All right. Where were you when "Shadow"  
22 made these statements?

23 A. Oh, it was the last time I was in prison  
24 before that.

25 Q. Any idea where you were serving your time?

1 A. Southern New Mexico Correctional Facility.

2 Q. Any idea the year?

3 A. No.

4 Q. What did "Shadow" say related to Gregg  
5 Marcantel?

6 A. I don't remember the exact words, man.  
7 Everybody talked about it.

8 THE COURT: Hold on.

9 MR. BECK: Objection, Your Honor, to  
10 relevance.

11 THE COURT: What's the relevance of going  
12 this far back? Aren't we focusing on the phone  
13 recordings?

14 MR. ADAMS: We are. But I started asking  
15 him about when he first heard about this, and he  
16 indicated it was from the Government agents, and then  
17 he followed up by saying, Well, I've heard about it  
18 from all sorts of sources, which is news me. So I'm  
19 trying to pin him down.

20 THE COURT: Let's go to the phone and the  
21 recordings.

22 MR. ADAMS: Yes, sir.

23 Q. So, in October of 2015, what agent  
24 contacted you about having phone calls related to  
25 Gregg Marcantel?

1 A. I believe it was Bryan Acee.

2 Q. And where were you when you had that  
3 conversation?

4 A. We had a few conversations. I don't  
5 remember exactly where that conversation took place.

6 Q. Where did you have conversations with him?

7 A. Sheriff's Department, Bernalillo County  
8 Sheriff's Department. Different places that we met.  
9 I don't remember where he gave me the phone, but I  
10 believe that's when the conversation took place.

11 Q. And that was after you'd been arrested?

12 A. Yeah.

13 Q. All right. What had you been arrested for?

14 A. Possession of heroin.

15 Q. What else?

16 A. I believe that was all.

17 Q. No weapons charge at that time?

18 A. No weapons charge, I don't believe.

19 Q. And you were arrested, and then you were  
20 approached by Special Agent Acee?

21 A. Pretty much.

22 Q. And this was in October of 2015?

23 A. I don't remember the date.

24 Q. Were you released on bond?

25 A. No. I was released on OR.

1 Q. You were released on OR. And was that in  
2 October of 2015?

3 A. I just told you, I don't remember the date,  
4 sir.

5 Q. How long were you in custody before you  
6 were released on OR?

7 A. I don't really remember.

8 Q. Do you not remember -- were you using drugs  
9 at that time?

10 A. Yeah.

11 Q. What drugs?

12 A. Heroin.

13 Q. And was that your drug of choice?

14 A. Yeah.

15 Q. And when you got out, what was your  
16 understanding of what you were supposed to be doing  
17 with Special Agent Acee?

18 A. Cooperating.

19 Q. Against the SNM?

20 A. Yes, sir.

21 Q. And did you have telephones?

22 A. Yes, I had a telephone.

23 Q. One telephone?

24 A. Yeah.

25 Q. You had one personal telephone in October

1 of 2015?

2 A. I probably had about four or five. I break  
3 a lot of phones.

4 Q. Why did you have so many phones?

5 A. Because I was using and selling drugs.

6 Q. What -- do you know what phone numbers you  
7 were using in October of 2015?

8 A. I don't remember.

9 Q. November of 2015?

10 A. I don't remember the phone numbers. I  
11 don't remember my last phone number. I've had a lot  
12 of phones.

13 Q. How did the idea come up, as best you  
14 remember, that the FBI would give you a telephone?

15 A. The best I remember, they had information  
16 that somebody was going to call me and ask me to do  
17 this.

18 Q. Okay. That's what they told you, and they  
19 said: Here, here's the phone we want you to use?

20 A. I think, so, yeah. I think that's how it  
21 happened.

22 Q. What were the instructions that you  
23 received from Special Agent Acee, or anyone else from  
24 the FBI, on how to use that phone?

25 A. To not use it for anything else but the



1 case.

2 Q. All right. And what did that mean to you?

3 A. That meant: Don't be using it for personal  
4 phone calls or stuff like that.

5 Q. All right. And did you know that they were  
6 going for a wire to record your phone calls?

7 A. I was under the understanding that the  
8 phone would be constantly monitored.

9 Q. And for 30 days?

10 A. I seem to remember him saying he had to  
11 renew it after 30 days, if it went past 30 days. I'm  
12 not sure that it did. I didn't really pay attention.  
13 I used it for what it was supposed to be used for.  
14 That's all.

15 Q. Okay. Do you remember when you first used  
16 it?

17 A. No.

18 Q. All right. If I had told you that the  
19 dates for the surveillance was October 26, 2015 to  
20 November 25, 2015, does that sound right?

21 A. Possibly.

22 Q. Were you using your other phones during  
23 that time also?

24 A. I use my phone for my personal phone calls,  
25 my home phone.

1 Q. I'm not trying to be a smart aleck with  
2 this question. You had said before you'd used your  
3 phones for drug stuff. Why were you using your phone  
4 after you'd been released on OR? Why were you using  
5 your personal --

6 A. My personal stuff. After I was released on  
7 OR. I wasn't selling drugs anymore.

8 Q. Using? Were you using?

9 A. I was on the methadone at that point.

10 Q. You were doing methadone. And what did  
11 that do to you?

12 A. It kept me from using heroin.

13 Q. It's a heroin substitute, a pharmaceutical  
14 substitute heroin?

15 A. Yeah.

16 Q. To wean you off of heroin so you can avoid  
17 potentially life-threatening withdrawals, right?

18 A. Basically.

19 Q. All right. And you were using that. Who  
20 helped you get that methadone?

21 A. The methadone clinic.

22 Q. All right. Who sent you there?

23 A. I did.

24 Q. So what were you using your personal phones  
25 for from October 26?

1 A. For personal reasons, sir. Calling my  
2 wife, my kids.

3 Q. Calling them from where? You weren't with  
4 them?

5 A. Not 24 hours a day. Are you with your wife  
6 and kids 24 hours a day, sir?

7 Q. If you don't mind. I'll ask the questions.

8 A. Oh.

9 Q. So what else were you using your phone for?  
10 Did you have any --

11 A. Personal reasons, sir.

12 Q. Did you have any personal reason to talk to  
13 any SNM member or affiliate?

14 A. A lot of people called my phone still.

15 Q. People had your numbers?

16 A. People had my number.

17 Q. And those would be people who were SNM  
18 members?

19 A. Everybody that I know.

20 Q. Chris Garcia had your number?

21 A. Probably.

22 Q. Well, you had called him a lot. You were  
23 close to Chris Garcia, weren't you?

24 A. Yes, I was.

25 Q. Very close to him; yes?

1 A. Yeah.

2 Q. He supplied you with drugs?

3 A. I believe you're his lawyer, right?

4 Q. And you bought drugs from him?

5 A. Yes.

6 Q. You've been to his house?

7 A. Yes.

8 Q. All right. And during that period of time,  
9 from October 26, 2015, to November 25, 2015, you had  
10 conversations with the people you knew before you had  
11 been arrested, like Chris Garcia?

12 A. I probably did. I don't recall  
13 conversations. It was a long time ago, like I said.  
14 And I was focused on getting out of there. I was  
15 tired of people wanting to kill each other and stuff.

16 Q. But you were out there, you'd been out on  
17 the street for a while.

18 A. Out of Albuquerque, sir, out of the  
19 situation.

20 Q. So what did you do when SNM members called  
21 you on your personal cellphone, during this period of  
22 time where the Government had supplied you with their  
23 own cellphone?

24 A. If they were part of this case -- I don't  
25 think that I talked to them anymore on personal

1 cellphones. I might have. I really don't remember,  
2 to tell you the truth, if I did or I didn't. But if  
3 they were part of this case, most of the calls were  
4 directed to the cellphone that was provided to me by  
5 Bryan Acee.

6 Q. My question is about the calls that weren't  
7 on the wiretapped phones.

8 A. My answer was I don't remember.

9 Q. What had Bryan Acee told you to do, if you  
10 received a call from Chris Garcia or any other SNM  
11 member on the non FBI-given cellphone?

12 A. I don't really remember what the  
13 instructions in that case were. My instructions were  
14 to use that phone only for this case, and not to use  
15 it for personal reasons.

16 Q. So, to the best of your knowledge, if you  
17 were -- received a call or called an SNM member from  
18 your personal cellphones, there was no instruction  
19 against that? You were just to use the Government's  
20 cellphone only for SNM calls?

21 A. Yes.

22 Q. All right. How did you communicate with  
23 Special Agent Acee during this period of time that  
24 there was a wiretap on your phone?

25 A. I don't really remember which phone I used.

1 I think I answered that question. But, specifically,  
2 I don't remember if I called him off my personal  
3 cellphone or that phone. I just don't remember.

4 Q. Did you text him?

5 A. Mr. Acee?

6 Q. Yes.

7 A. A few times probably, yeah.

8 Q. From the cellphone he gave you, or from  
9 your personal cellphone?

10 A. I just told you. I don't remember. There  
11 was really no instructions on talking to Mr. Acee.  
12 It was -- that phone was supposed to be used for  
13 these purposes, and these purposes only. I just told  
14 you that about four times.

15 Q. I'm talking about your cellphone, sir.

16 A. And I don't believe I was given  
17 instructions on what to do with my own personal  
18 cellphone, is what I keep telling you -- I keep  
19 trying to tell you. Maybe I'm not articulate enough,  
20 but --

21 Q. When you received contact from SNM members  
22 on your new cellphone that had been provided by the  
23 FBI, what did you do when you got those calls?

24 A. I listened, and agreed.

25 Q. What did you do related to Mr. Acee when

1 you got off the phone? Let's say you got a call from  
2 Eric Duran --

3 A. I talked -- I didn't talk to him every day  
4 like that. I was under the assumption that he was --  
5 the phone was wiretapped and they were listening in  
6 on it.

7 Q. When the topic of Gregg Marcantel came up,  
8 did you then get off the phone from the SNM-related  
9 call and then call Mr. Acee to talk about it?

10 A. I don't remember any circumstance where I  
11 did.

12 Q. Do you remember any direction that Special  
13 Agent Acee gave you about what to do in these calls?

14 A. Just told me what was going to happen. I'm  
15 going to say it again. They told me: Use this phone  
16 for this purpose only, do not make personal phone  
17 calls on this phone. The phone is wiretapped,  
18 everything is going to be recorded on it. And  
19 everything that's on that phone, you guys have it, so  
20 I don't know why you keep asking me. It's a long  
21 time ago. I had a lot of stuff going on in my life,  
22 and I was trying to get out of Albuquerque.

23 Q. So you don't remember any conversations  
24 with Special Agent Acee, either on that phone or on  
25 the other phones, about what to do in your

1 interactions with SNM members.

2 MR. CASTELLANO: Objection, asked and  
3 answered.

4 THE COURT: Overruled.

5 A. Can you repeat it one more time? Say it  
6 again.

7 Q. You don't remember any specific  
8 conversation or direction from Special Agent Acee  
9 about what to do in response to SNM calls to you  
10 related to Gregg Marcantel?

11 A. Let them talk, go along with it, I believe  
12 is what the instructions were. And I don't know if  
13 they came specifically from Bryan Acee. But that was  
14 what I was under the impression of what I was  
15 supposed to do in that situation. I think they  
16 pretty much already knew what was going on from the  
17 other phone that they had in the prison.

18 Q. From Eric Duran's phone?

19 A. I guess.

20 Q. That was your understanding at the time?

21 A. That's what I thought. That's my personal  
22 thought.

23 Q. Did you know Eric Duran was a government  
24 cooperator during that time?

25 A. I don't believe so, at first.



1 Q. In the time you were wiretapped, in October  
2 and November of 2015?

3 A. I don't believe so.

4 Q. So when Eric Duran was calling you on your  
5 cellphone that the Government had given you, you  
6 didn't know that he was undercover for the  
7 Government?

8 A. No.

9 Q. All right. Why did you agree to cooperate?

10 A. At one time or another everybody in this  
11 courtroom right here, that's in a jail jumpsuit, has  
12 asked me to kill one of the other ones. And they  
13 smile in each other's face, or kill somebody else.  
14 Or -- and the minute I leave the room, I'm a snitch.  
15 So I just said, You know what, I'm tired of this.  
16 And so I was living my life. Even though I was on  
17 drugs, I was living my life out there in the streets.  
18 And these guys brought this case on themselves, and  
19 me, and everybody else in it.

20 Q. And so that's why you decided to cooperate?

21 A. Yeah, pretty much.

22 Q. What did you hope to get out of  
23 cooperation?

24 A. I hoped to get away from this -- what I  
25 just told you. I'm tired of living like that. Even

1 if it's in jail, I'm tired of living like that.

2 Q. I'd like to talk to you a little bit about  
3 what happened to the phone. On December 3, 2015, a  
4 lot of these gentlemen were arrested and a lot of  
5 other SNM members were arrested, both in prison and  
6 outside of prison. Do you remember that date?

7 A. I remember people were getting arrested,  
8 and I was going to be leaving town in a hurry.

9 Q. And they had talked to you about getting  
10 out of town so nothing could come back on you, right?  
11 Special Agent Acee had had that conversation with  
12 you?

13 A. I don't think he -- it was understood  
14 before that I'd be leaving town, and this started to  
15 be known.

16 Q. And your phone that he had given you was  
17 still working at the time of the takedown, wasn't it?

18 A. I don't remember if it was working or not.  
19 Once everything was pretty much over with, I had the  
20 phone in a backpack with a couple other things,  
21 laptop and tablets and just basic electronics that  
22 belonged to me.

23 Q. Did Special Agent Acee talk to you about  
24 staying -- keeping the phone close by, in case you  
25 got some calls after the arrests started going down?

1 A. I don't remember that conversation.

2 Q. Did you have the phone with you in early  
3 December of 2015?

4 A. I had the phone with me almost to the day I  
5 left town.

6 Q. And when was that day?

7 A. Late December. I didn't have it until the  
8 day I left, until maybe a week or two before, maybe.

9 Q. So sometime in mid December is when you got  
10 rid of the phone?

11 A. Sometime between the time everybody was  
12 arrested and the time I left town, I turned in the  
13 phone.

14 Q. So when everybody was arrested, you still  
15 had the phone?

16 A. I believe so.

17 Q. And it was still in working order?

18 A. I believe so.

19 Q. And were your instructions at that time to  
20 continue using the phone?

21 A. My instructions were not to use that phone  
22 for anything else except for this case.

23 Q. Thank you for that.

24 So was your instruction to continue using  
25 the phone for this case?

1 A. No.

2 Q. -- until --

3 A. After everybody was arrested, I believed  
4 the case was over at that point, the talking on the  
5 phone stuff anyway.

6 Q. All right. But on December 3, were you  
7 being asked to keep the phone on, so if you got any  
8 calls from any of the SNM members --

9 A. I don't remember. I don't remember.

10 Q. Was the phone still working --

11 A. I don't know.

12 Q. -- on December the 3rd?

13 A. I don't know.

14 Q. Well, the wiretap was over November the  
15 25th?

16 A. I don't know when.

17 Q. Do you recall if you used the phone after  
18 November 25?

19 A. I don't remember.

20 Q. Why were you carrying it around, if you  
21 weren't using it?

22 A. I wasn't carrying it around. It was in a  
23 backpack with other electronics that -- I think I  
24 just told you that.

25 Q. You said you were carrying around the

1 backpack.

2 A. No. I was packing my stuff actually to  
3 leave town. And it was in the backpack with other  
4 electronic items that I had.

5 Q. You were leaving town with Special Agent  
6 Acee's telephone?

7 A. No. I was packing my stuff to leave town.  
8 I was leaving, so I had everything that I was  
9 responsible for, including that cellphone, in the  
10 backpack with other electronic items that belonged to  
11 me, my wife, my son, and my daughter.

12 Q. Did you have a phone call at some point  
13 with Mr. Baca, on --

14 A. Numerous.

15 Q. -- on the FBI cellphone?

16 A. Numerous conversations. I think there was  
17 a few.

18 Q. Was there a conversation about destroying  
19 the cellphone?

20 A. I'm not really sure if we had that  
21 conversation or not. I vaguely remember it.

22 Q. Well, if you vaguely remember it, what are  
23 your vague recollections?

24 A. I remember that I really didn't have to  
25 keep track of this stuff, because most of this

1 recordings was wiretapped. So I pretty paid much  
2 attention to as little of it as I could, to tell you  
3 the truth. Yes, okay, okay, I'm going to do that  
4 right now.

5 Q. Do you remember saying that, okay, okay,  
6 okay, I'm going to go get rid of this cellphone?

7 A. I remember specifically the conversation  
8 where he wanted me to -- after I killed Gregg  
9 Marcantel or Santistevan, to kill "Chuco." And I'm  
10 pretty sure, yeah, that he did ask me to destroy the  
11 cellphone and get rid of the gun and kill "Chuco."  
12 Yeah, I'm pretty sure.

13 Q. And did you agree to do that?

14 A. Yeah.

15 Q. To get rid of the cellphone?

16 A. I agreed to do everything he asked me to  
17 do.

18 Q. And what happened to the cellphone?

19 A. I turned it back in to Bryan Acee.

20 Q. How was it working then?

21 A. I had ran over the whole backpack.

22 Q. How did that happen?

23 A. I was packing an RV, getting ready to leave  
24 town. And it was left in the back, in-between the  
25 trailer and the RV. And when I pulled out, ran over

1 something, and it was the backpack.

2 Q. So you had a backpack with all your  
3 family's electronics in it behind the wheel of the  
4 RV?

5 A. Actually on a trailer, and I was putting  
6 stuff on top of the RV, inside the cars and stuff,  
7 and I missed it.

8 Q. And you ran over the bag?

9 A. I ran over the whole bag.

10 Q. And what happened to the cellphone?

11 A. It was damaged.

12 Q. Did you try to turn it on after that to see  
13 if it would still work?

14 A. I didn't.

15 Q. Was it still powered up?

16 A. I don't even know if it was powered up. I  
17 don't think it was.

18 Q. What day was that?

19 A. I don't remember.

20 Q. Did you contact Special Agent Acee to  
21 report that you'd run over his cellphone?

22 A. I don't think I specifically contacted him.  
23 I didn't even think they wanted that phone back. I  
24 thought that --

25 Q. You thought it was a gift?

1           A.    No, I thought it was off, and I thought it  
2   was done, and I thought they had the wiretaps, didn't  
3   think that phone was very important.  Actually, I was  
4   more concerned with my daughter's laptop and her  
5   stuff.

6           Q.    So when did you turn that phone back over  
7   to Special Agent Acee?

8           A.    I seen him before I left town, I think  
9   maybe on the day I went to court.  I don't know what  
10   day it was.  Maybe it was that day.  And I think it  
11   might have been, and --

12          Q.    The same day you ran over it?

13          A.    No, the day I went to court.

14          Q.    How many days after running over the phone  
15   was that?

16          A.    I don't remember.

17          Q.    Was it two days?

18          A.    I don't remember.

19          Q.    A week?

20          A.    I don't remember.

21          Q.    Two weeks?

22          A.    It could have been a year.  I don't  
23   remember.

24          Q.    And is it your testimony that it was an  
25   accident to run over a bag of electronics?



1 A. Yeah. Yeah.

2 Q. I'd like to ask you about the body  
3 recorder. Were you asked to wear a wire on November  
4 29, 2015, and go to Chris Garcia's house?

5 A. Yeah.

6 Q. How did that conversation --

7 A. I don't remember the date, but I remember I  
8 was asked to wear a recording device and go to Chris'  
9 house.

10 Q. Who asked you?

11 A. Agents.

12 Q. Which agents?

13 A. I believe it was Bryan Acee. Most of my  
14 conversations were with Bryan Acee.

15 Q. Were those in-person conversations or on  
16 the telephone?

17 A. In person.

18 Q. Did you have his cellphone number?

19 A. Bryan Acee's?

20 Q. Yes.

21 A. Yes.

22 Q. Did you call him up on the cellphone from  
23 time to time?

24 A. No.

25 Q. Did you text him on the cellphone from time

1 to time?

2 A. I would wait for him to contact me.  
3 Usually, like I said, I was really busy. I was  
4 trying to get out of town. I didn't want to be  
5 involved in none of this stuff, sir. I was dragged  
6 into it.

7 Q. So how -- where were you when the  
8 conversation happened about you wearing a wire?

9 A. I believe it might have been in the parking  
10 lot to a church near Chris' house, I believe, maybe.

11 Q. How did you know to go there to meet Bryan  
12 Acee?

13 A. Either came to my house or I talked to him,  
14 he called me. I don't remember.

15 Q. Did he come by your house -- during that  
16 time period, October, November, December of 2015,  
17 would he drop by your house from time to time?

18 A. I don't really remember, like specifically  
19 him coming to my house. I remember this case was  
20 going. I remember -- yeah, I had phone contact with  
21 him. I don't remember which phone it was on. I've  
22 already told you that. It was either in person or on  
23 the phone he asked me to meet him at the church on  
24 that day. I don't remember which.

25 Q. Which church?

1           A.    I don't know the name of the church.  It's  
2   on Central, near 98th Street.

3           Q.    Where did you meet him at the church?

4           A.    In the parking lot.

5           Q.    Did you get there first or did he get there  
6   first?

7           A.    I believe I did.

8           Q.    Okay.  And how long did you wait on him to  
9   show up?

10          A.    Not long.

11          Q.    Did you know when you went over there that  
12   you were going to be asked to wear a wire?

13          A.    I don't remember, but -- I probably would  
14   assume I did.  But I don't remember.

15          Q.    So what happened when he showed up, when  
16   Bryan Acee showed up to the parking lot of the  
17   church?  What did he say to you?

18          A.    It kind of refreshed my memory a little  
19   bit.  I believe I was there -- I believe I did know I  
20   was going to wear a wire.  I believe the phone  
21   conversation had been with Baca asking me to go get a  
22   weapon from Chris.  And I believe that's why I was  
23   there, to get the wire, to get to Chris' to pick up a  
24   weapon.

25          Q.    Did you report to Special Agent Acee or any

1 other of your handlers that you had been asked to go  
2 get a weapon from Garcia?

3 A. No. I believe it was on the wiretaps. I  
4 believe they knew.

5 Q. So you had that conversation allegedly with  
6 Mr. Baca, and then you just waited to hear from the  
7 special agents?

8 A. We were in contact about that, yeah, pretty  
9 much.

10 Q. All right. So then, when you got there,  
11 what was the conversation about the wire? So now you  
12 think you remember that you knew you were going to be  
13 asked to wear a wire. What did the agent say when he  
14 pulled up next to you in the parking lot?

15 A. Asked me if I was ready. Told me I'll be  
16 all right. And just go and do what I had to do.

17 Q. What do you mean "be all right"? What did  
18 that mean to you?

19 A. I worry about my safety, my family's safety  
20 a lot. Because, like I said, every one of them has  
21 asked me to kill the other one at one time or  
22 another.

23 Q. So how -- what does being all right mean?  
24 What did you think that meant? That they were going  
25 to be there watching the whole time?

1 A. Yeah.

2 Q. And did you talk to them about that, like:  
3 Are you guys going to be close by, in case anybody  
4 finds a wire on me?

5 A. I didn't specifically. I don't think I  
6 did.

7 Q. And so what was the plan when they were  
8 putting this wire on you?

9 A. The plan was I was going to go and pick up  
10 a weapon from Chris.

11 Q. Were you talked to about what conversations  
12 to try to get Mr. Garcia to say onto the wire?

13 A. No, I was never told to get anybody to say  
14 anything. I was told to --

15 Q. What were you told to do?

16 A. To go and let them talk.

17 Q. Where was the wire? How did it get put on  
18 you?

19 A. I believe it was a small box. I don't  
20 think it got put on me, or anything like that.

21 Q. Did it get taped to your body?

22 A. I don't remember. I could tell you what it  
23 looked like, a small box, rectangular shape.

24 MR. BECK: Objection, Your Honor.

25 THE COURT: Do you need any more

1 information than that?

2 MR. ADAMS: I do, Judge, because of his  
3 ability to control what's recorded.

4 THE COURT: Well, ask him about his ability  
5 to control. But let's don't get into a description  
6 of the device.

7 Q. Let me try this one and see if it helps.  
8 Was there a microphone separate from the box?

9 A. I don't think so. I think it was all one  
10 unit.

11 Q. What part of your body was this placed on?

12 MR. BECK: Objection, Your Honor.

13 MR. ADAMS: Judge, I had a case that was  
14 similar, many years ago, and they put a wire between  
15 the thighs of the sister-in-law of my client. And  
16 there were inaudible parts of the tape. And our  
17 theory was that she knew how to manipulate the wire  
18 by ruffling her legs together during the part of the  
19 case that she didn't like. We had experts to testify  
20 to that, and that was a quick acquittal. I think  
21 it's important to understand where the wire was and  
22 how he may have the ability to manipulate what was  
23 recorded.

24 THE COURT: What do you feel comfortable  
25 asking, Mr. Beck?

1 MR. BECK: I feel comfortable if he wants  
2 to ask whether he can --

3 THE COURT: Why don't you do this: Why  
4 don't you ask these questions right here, and we'll  
5 see if -- just stand right there, Mr. Adams. He can  
6 ask them from there. Just stand there and we'll see  
7 if we can get it out.

8 MR. BECK: Mr. Montoya, could you somehow  
9 manipulate with your body the quality of what was  
10 recorded on that recording device?

11 THE WITNESS: I don't know. It never  
12 crossed my mind. I thought it recorded the whole  
13 time. And I'm naturally paranoid. Even if I turn my  
14 cellphone off, I think it can record what I'm saying.

15 MR. ADAMS: It can.

16 THE WITNESS: I'm not that paranoid then.

17 MR. BECK: Did you -- were you able to turn  
18 on and off this recording device?

19 THE WITNESS: I don't know.

20 MR. BECK: Were you able to start and stop  
21 the recording device?

22 THE WITNESS: I don't know.

23 THE COURT: What else do you need?

24 MR. ADAMS: Well, Judge, I will point out  
25 there are large portions of the tape that are

1 inaudible. So I'd like to follow up on this. I  
2 mean, I get that the Government likes what they  
3 elicited. But I think we still have our questions  
4 about what he thought and what he did.

5 THE COURT: Well, I think you've gotten  
6 enough of a description of the device. Let's move  
7 on.

8 BY MR. ADAMS:

9 Q. What was your understanding about how the  
10 device recorded?

11 A. It's a recording device that records.

12 Q. Okay. Did you ask Special Agent Acee  
13 anything about how it worked?

14 A. I really didn't care how it worked. I  
15 really didn't care about any of this stuff.

16 Q. You didn't care if it got an accurate  
17 recording or an inaccurate recording?

18 A. I don't know how you can get an inaccurate  
19 recording. People say what they say. It's not like  
20 I can say yes, and the recorder said it said no. I  
21 didn't really care. I carried the recorder there to  
22 talk to Chris about a weapon, and I carried it back.

23 Q. And then what happened after that  
24 conversation?

25 A. Well --



1 Q. Well, let me ask this first. When you went  
2 to meet Chris Garcia, where was he?

3 A. I believe he was at his house.

4 Q. Inside -- did you go inside the house?

5 A. I don't remember. I talked to him inside  
6 his house sometimes, sometimes in the garage, and  
7 sometimes in the driveway, sometimes in my car,  
8 sometimes in his car.

9 Q. I'm talking about the day you left his  
10 house with a gun that you gave to Special Agent Acee.  
11 Let's focus on that day, November 29, 2015. Do you  
12 know where you were at Chris Garcia's house?

13 A. I think I might have went into his house.

14 Q. Do you know? Are you clear on that?

15 A. No, I'm not clear on it.

16 Q. Where was the gun?

17 A. I don't know where it was. I think --

18 MR. CASTELLANO: Objection, relevance, Your  
19 Honor. This has nothing to do with the recordings at  
20 all. It's basically defense counsel trying to  
21 collect evidence for purposes of trial.

22 MR. ADAMS: This is defense counsel  
23 actually trying to fill in the blanks on inaudible  
24 parts of the recording, Your Honor.

25 THE COURT: Well, I doubt you're going to

1 be able to do that with this witness. So let's --  
2 sustained. Who is defending this?

3 MR. BECK: Sorry. I objected to the first  
4 one on accident. It's Mr. Castellano. I apologize  
5 for that. And then I --

6 THE COURT: Pick one.

7 MR. BECK: -- I apologize to Mr. Adams.

8 THE COURT: You can't double tag team here.

9 MR. ADAMS: Judge, I tell you I have no  
10 problem with that. But I'm going to tag in Ms.  
11 Sirignano any second, and we'll just get it on right  
12 here.

13 THE COURT: Well, not in my courtroom.

14 MS. SIRIGNANO: Come on, Judge.

15 BY MR. ADAMS:

16 Q. Okay. What did you do with the recording  
17 after you left Garcia's house?

18 A. I believe I gave the device and the weapon  
19 back to the agents. And I don't remember which  
20 agents I gave it to, to tell you the truth. There  
21 was a heavysset black gentleman that I hadn't seen too  
22 often. As a matter of fact, now that you refresh my  
23 memory a little bit, he was supposed to be watching  
24 me the entire time. I think he was following.

25 Q. Did you ever see him?

1           A.    I didn't really pay attention. Like I told  
2   you, I just did what I was supposed to do, and took  
3   it back. I wasn't looking over my shoulder or acting  
4   suspicious or nothing.

5           Q.    Where did you give -- did you give the gun  
6   back to Special Agent Acee or to this gentleman who  
7   was following you?

8           A.    I don't remember which one I gave it to.

9           Q.    Did you go back to the church, or did you  
10  go somewhere else?

11          A.    I kind of want to say the church, but I'm  
12  not exactly sure.

13          Q.    Were you on methadone all during this time?

14          A.    Yes, I was.

15          Q.    How did that impact your memory or your  
16  ability to take stuff in? Would you get high on  
17  methadone?

18          A.    I've been high most of my life, or on some  
19  type of medication. I would say it affects people's  
20  functioning. But like I said, it's recorded, so --

21          Q.    Did you ever sit down with Special Agent  
22  Acee, or anyone else, and go over the recording?

23          A.    No.

24          Q.    Did you ever talk to them about the parts  
25  of the recording that were inaudible; fill in the

1 blanks about what wasn't recorded?

2 A. I never had any conversations about the  
3 recordings with anybody. Once it was done, I pretty  
4 much put it out of my head. I told you, I think, I  
5 don't even want to participate in this stuff. I got  
6 drug into it pretty much by your clients.

7 Q. Was the recording device, to your  
8 knowledge, on the entire time, or was this something  
9 you could turn on and off?

10 A. I assume it was on the entire time. Like I  
11 said, I think my cellphone can record when it's off;  
12 you said that you also agreed. Remember?

13 Q. Yes. Did you ever -- backing up to your  
14 cellphone calls on the cellphone Bryan Acee gave you,  
15 did you ever go over those calls?

16 A. I never went over any of the conversations  
17 with anybody. It was what it was. It speaks for  
18 itself. I don't know what's on the recordings. But  
19 if those conversations are on the recordings, they  
20 speak for themselves. I didn't think I had to  
21 remember any of that stuff.

22 Q. When you ran over the cellphone, were there  
23 any witnesses to that?

24 A. No. Actually, I was planning on leaving  
25 town, and I had the RV parked somewhere else. I

1 didn't want nobody to see the RV with my car and a  
2 trailer and bags packed. So, pretty much, I would go  
3 and I would pack and get stuff ready.

4 Q. All right. But that day you actually  
5 cranked the engine and moved the vehicle?

6 A. I cranked it and moved it on a couple of  
7 different occasions. But it wasn't parked at my  
8 house.

9 Q. Did your wife see you run over the bag?

10 A. No.

11 Q. Your daughter?

12 A. No.

13 Q. How did it come about that you handed that  
14 broken phone or runover phone or cracked screen phone  
15 back to Bryan Acee?

16 A. I was leaving town. I went to court. The  
17 last time I spoke to him -- I'm not positive, but I  
18 think it was at the courthouse in Albuquerque.

19 Q. And he asked for the phone, or you  
20 volunteered to give it?

21 A. He asked for it.

22 Q. And what did you say?

23 A. I said, "The screen is broken."

24 Q. And that was it? Just a cracked screen.

25 A. I don't even know how damaged the phone

1 was. Like I said, I never tried to turn it on. That  
2 was not my phone. I didn't really care about that  
3 phone.

4 Q. To your knowledge, was the back of the  
5 phone still attached?

6 A. I don't remember.

7 Q. You remember a cracked screen?

8 A. I remember the phone was broken. I  
9 remember all the electronics in that bag were broken.  
10 The things I was paying attention to was my  
11 daughter's laptop, her tablet, and my wife's Nook.

12 Q. Why were you still carrying around a bag of  
13 broken electronic equipment?

14 A. It didn't belong to me.

15 Q. Well, the laptop did, the Nook did, and  
16 other items in the backpack did.

17 A. I didn't carry them around. Like I said,  
18 it was in preparation for leaving. It was in the  
19 bag. He asked me for it. It was still in the bag.  
20 I gave it to him.

21 Q. All right. So what did he say when he saw  
22 it? What did he tell you when you gave him back  
23 broken equipment, that he had paid for, from the FBI?

24 A. I don't really remember.

25 Q. You have no recall of his reaction to

1 receiving back a broken item?

2 A. I don't think it was very much of a  
3 reaction, because now, if I remember, I didn't think  
4 he was too upset about it. I don't know.

5 Q. Have you been in communication with Special  
6 Agent Acee lately?

7 A. No.

8 Q. Have you been in communication with him  
9 since you were recently arrested?

10 A. I don't really remember, no. No.

11 Q. You're just allowing your lawyers to  
12 interact with the Government on your behalf?

13 A. I spoke to him here yesterday.

14 Q. Did they take a DNA swab from you?

15 A. No.

16 MR. ADAMS: Judge, since we're only allowed  
17 to have one lawyer, let me go confer quickly with Ms.  
18 Sirignano.

19 THE COURT: Well, I'm not that hung up on  
20 it, if nobody else is. But we might establish some  
21 rules of engagement before we get to trial so that  
22 people don't complain about each other.

23 MR. ADAMS: Thank you. We don't have  
24 anything further.

25 THE COURT: All right. Thank you, Mr.

1 Adams.

2 Does anybody else on the defense side have  
3 any questions of Mr. Montoya? Mr. Lowry?

4 MR. LOWRY: Yes, Your Honor.

5 EXAMINATION

6 BY MR. LOWRY:

7 Q. Good morning, Mr. Montoya.

8 A. Good morning.

9 Q. Mr. Montoya, if I understood you correctly  
10 on your testimony just now, you said the recording  
11 speaks for itself; is that right?

12 A. Yeah.

13 Q. Okay. And if I understood your testimony  
14 correctly, you've never reviewed this recording?

15 A. Never heard it. I'm just assuming it  
16 recorded everything that was said.

17 Q. Do you have any reason to doubt that if I  
18 told you there were gaps in this recording where you  
19 can't hear the conversation?

20 A. I don't have any reason to believe or doubt  
21 it. Like I said, I really don't care. I took it,  
22 and I brought it back.

23 Q. Well, I'm a little -- and this is not on  
24 you, this is on me -- but when you say the recording  
25 speaks for itself, but there is nothing on the



1 recording, so the recording is not speaking for  
2 itself.

3 A. It has nothing say, I guess.

4 Q. Well, is there any reason why the recording  
5 wouldn't pick up the conversation or the ambient  
6 background sounds?

7 A. I don't know, man.

8 Q. You don't know.

9 A. It was a long time ago. I don't really  
10 remember what was going on with that recording. I  
11 don't remember any instructions on it. I don't  
12 remember any of that. I just remember I took it and  
13 I brought it back.

14 Q. Okay. And I realize it was a long time  
15 ago. But can you recall anything you might have even  
16 inadvertently done to inhibit or stop the recording  
17 from picking up sounds?

18 A. I really don't remember. Like I told you,  
19 like I told him, I don't remember. I followed the  
20 instructions I was given at the time. That's all I  
21 can say.

22 Q. Okay. I don't want you talking about where  
23 the recording device was on your body, or anything  
24 like that. But is there any body movement you could  
25 have done that would have stopped or covered up that

1 recording to keep it from capturing the sounds?

2 A. I wasn't really paying attention to it,  
3 man. I wasn't trying to be -- can you say that  
4 again -- or anything like that -- I just kind of  
5 remember where it was, you know what I mean?

6 Q. Sure. You said you didn't really want to  
7 be there.

8 A. No.

9 Q. Why were you there, then?

10 A. Because my name was mentioned somewhere  
11 along the way on another wiretap, where a bunch of  
12 morons were in their cells trying to act like -- I  
13 don't know what -- and trying to get people to do  
14 things for them on the streets. And I ended up  
15 pulled into this case.

16 Q. Do you feel like you've -- what I'm hearing  
17 you say is your participation wasn't voluntary.  
18 Would you agree with me?

19 A. My participation was voluntary after I was  
20 already drug into the case. But, no, I didn't want  
21 nothing do with most of these guys. I would talk to  
22 them, keep it cordial. I don't think very highly of  
23 most of them -- some of them, I believe they're  
24 decent guys if they weren't involved in this. But  
25 most of them just sit in their cells and fantasize,

1 and think of ways to mess anybody up that they can,  
2 trying to make themselves feel better, get what they  
3 can out of them. So that's my personal opinion.

4 MR. LOWRY: I have no further questions,  
5 Your Honor. Thank you.

6 THE COURT: Thank you, Mr. Lowry.

7 Any other defendant has cross-examination  
8 of Mr. Montoya?

9 All right. Mr. Castellano.

10 EXAMINATION

11 BY MR. CASTELLANO:

12 Q. So, Mr. Montoya, was it difficult for you  
13 to cooperate in this case?

14 A. Yes, it was.

15 Q. And do you find it difficult to testify on  
16 the stand?

17 A. Yes, I do.

18 Q. If you had your choices, would it be  
19 something you would rather not do?

20 A. Yes, it would.

21 Q. And do you understand the situation you're  
22 in now, in terms of your agreements with the  
23 Government, and are you willing to continue with that  
24 agreement?

25 A. Yes. I gave my word. That's one thing

1 I --

2 Q. But if you had your choice in life, you  
3 would rather not be doing it; isn't that fair to say?

4 A. I would rather not be here. I would rather  
5 be going on with my life.

6 Q. So let me just ask you a few questions  
7 here. Okay. So you were told to use the cellphone  
8 only -- the wired cellphone, only for SNM business;  
9 is that correct?

10 A. Yes, sir.

11 Q. Now, you mentioned you had at least one  
12 other phone that you used for personal business. Do  
13 you remember that?

14 A. Yeah.

15 Q. Okay. So when we talk about personal  
16 business, is it talking to friends, talking to your  
17 wife, things that people do with phones regularly?

18 A. I was talking to my wife and my kids  
19 mostly.

20 Q. Now, at that time, did other SNM members  
21 have your personal cellphone?

22 A. I don't really recall, to tell the truth.  
23 I remember that I was told to use that phone just for  
24 that case. I can't say for sure, one hundred  
25 percent, whether I used that phone to talk to anybody

1 else, or if they had my number still. I changed my  
2 numbers a lot. I'm really clumsy with cellphones. I  
3 break them all the time. They're on my lap, I get  
4 out of the car, they fall out. The screen breaks. I  
5 change phones a lot. And before that, like I said,  
6 was selling drugs, so I would change phones out of  
7 paranoia. I don't remember if I used the other phone  
8 for anything else, my personal phone was mostly  
9 after. After I was arrested, my personal phone was  
10 mostly for my kids and my wife, and that was it.

11 Q. And then, if somebody called you on your  
12 phone, and it had to do with SNM business, would you  
13 try to call them to get them to use the phone that  
14 was being monitored, if you remember?

15 A. I would assume, yeah. I don't really  
16 remember. But everything to do with the case, or  
17 anybody -- I would assume anybody from SNM, their  
18 calls would probably go to that phone. I'd probably  
19 tell them I'll call you back, or something like that,  
20 or tell them, "I changed my number."

21 Q. And if it was anything to do with criminal  
22 activity, would you try to talk to them on the phone  
23 that was being monitored?

24 A. Yeah.

25 Q. You mentioned you weren't quite sure when

1     you quit using the phone. So let me ask you this, in  
2     terms of -- since it was December, and the holidays  
3     were during that month, do you remember if you  
4     finished using the phone maybe before or after  
5     Christmas?

6           A.     It was way before Christmas. I believe I  
7     left on Christmas Eve -- or not way before Christmas.  
8     It was probably right before Christmas sometime.

9           Q.     So around the Christmas holidays?

10          A.     Before Christmas.

11          Q.     Now, when you were done with the  
12     recordings, and people were being arrested, did you  
13     have any other reason to use the monitored phone?

14          A.     No. I didn't want contact with anybody  
15     else. So at that point I was avoiding contact with  
16     people. I don't even think I was using my own phone  
17     that much other than just making plans to get out of  
18     town.

19          Q.     Is that because you were getting out of  
20     town to avoid anybody -- the fact that people might  
21     know that you were cooperating at that point?

22          A.     Yeah.

23          Q.     And at that point, then, did you want to  
24     have anything to do with this case or the  
25     investigation?

1           A.    As little as possible. I fulfilled my  
2 obligation and move on with my life.

3           Q.    As far as you can recall, after getting the  
4 gun from Chris Garcia, were you aware of any other  
5 reasons why you might need to use that phone?

6           A.    No. I think that was pretty much the end  
7 of it.

8           Q.    You mentioned that the agents told you that  
9 you would be all right. Were there discussions about  
10 safety?

11          A.    Yeah.

12          Q.    And did they give you any assurances that  
13 they would be watching you and keeping you safe?

14          A.    Yeah. I believe the other agent, the one I  
15 mentioned earlier -- I didn't know who he was -- I  
16 believe -- I'm pretty sure that was the reason why he  
17 was there. I'm pretty sure somebody said that. I'm  
18 pretty sure that he was going to be watching me  
19 pretty much most of the time that he could.

20          Q.    Was it your understanding, then, that  
21 somebody would be watching you, as best as you knew,  
22 throughout that operation when you picked up the gun?

23          A.    I assume that. And I want to say I was  
24 told that. But, like I say, it was a long time ago.  
25 And I was, like, doing what I was pretty much told:

1 Take it, bring it back. And I'm pretty sure the guy  
2 was -- yeah, that's what his purpose was, he told me  
3 that.

4 Q. And what were your concerns about safety on  
5 that particular day?

6 A. Man, I'm going to go get a gun from  
7 somebody to kill the Secretary of Corrections. I was  
8 pretty worried about my safety.

9 Q. You mentioned earlier that Mr. Baca told  
10 you to do at least three things: One was get the  
11 phone; kill "Chuco" -- no, destroy the phone; kill  
12 "Chuco." And there was one other thing. Oh, get rid  
13 of the gun; is that correct?

14 A. Yeah. And the more we talk about it, I  
15 remember a little bit more, yeah. Yeah, I definitely  
16 remember the conversation a little bit better. Get  
17 rid of the gun, get rid of the phone, and take care  
18 of that guy.

19 Q. Even though you told him you were going to  
20 do those things, did you really intend to kill  
21 "Chuco," get rid of the gun, and get rid of the  
22 phone?

23 A. No, I didn't. As a matter of fact, "Chuco"  
24 is one of the people that I mentioned earlier that  
25 probably got drug into this, just like I did.



1 MR. CASTELLANO: May I have a moment, Your  
2 Honor?

3 THE COURT: You may.

4 MR. CASTELLANO: Thank you, Your Honor. I  
5 pass the witness.

6 THE COURT: Thank you, Mr. Castellano.

7 Mr. Keefe, do you need anything? Clear up  
8 anything.

9 MR. KEEFE: No, Your Honor.

10 THE COURT: All right. Mr. Adams.

11 MR. ADAMS: Thank you. I have some brief  
12 follow-up to Mr. Castellano's questions.

13 REDIRECT EXAMINATION

14 BY MR. ADAMS:

15 Q. You had told the prosecutor that you just  
16 wanted to get out of state, to be going on with your  
17 life. What do you mean by going on with your life?

18 A. Getting out of the situation with these  
19 guys. I'm telling you, I don't know how many  
20 times -- it's like living in a snake pit. I'm tired  
21 of it.

22 Q. So you wanted to get away from the snake  
23 pit?

24 A. Yes.

25 Q. Get away from criminal behavior?

1 A. To the best of my ability, yes.

2 Q. Get away from drugs?

3 A. Yes.

4 Q. What do you mean to the best of your  
5 ability?

6 A. I'm a drug addict. I've been a drug addict  
7 of my life.

8 Q. Have you spoken to Mr. Castellano today  
9 before the witness stand?

10 A. Briefly.

11 Q. He was in the room with you when you were  
12 with your attorneys?

13 A. Yes.

14 Q. And is it your memory today, as you're  
15 here, that you believe you left the state, in 2015,  
16 on Christmas Eve?

17 A. Thereabouts.

18 Q. And is that the day or the time you gave --  
19 the day you left, was that the day you gave Mr. Acee  
20 back his phone?

21 A. No. I believe I gave it back to him the  
22 day I went to court.

23 Q. Do you happen to know what day that was?

24 A. Really?

25 Q. Fair enough. Do you happen to know if that

1 was immediately before you left the state?

2 A. It wasn't immediately before I left the  
3 state. I don't think it was immediately before I  
4 left the state. I think it was -- I had about maybe,  
5 I don't know how long, a week or so, to finish  
6 getting ready after everything was wrapped up.

7 Like I said, it was a while back. A lot of  
8 stuff was going on. I'm trying to figure out where  
9 I'm going. What I'm doing. Stuff happened pretty  
10 fast. And I don't know what else to tell you, man.  
11 I don't really remember the day.

12 MR. ADAMS: Thank you.

13 THE COURT: Thank you, Mr. Adams.

14 Did you have something, Mr. Lowry?

15 MR. LOWRY: Just very briefly, Your Honor.

16 EXAMINATION

17 BY MR. LOWRY:

18 Q. Mr. Montoya, were all of your recordings,  
19 were all of your conversations with Mr. Baca on the  
20 FBI phone that was being recorded?

21 A. From the time I got that phone to the time  
22 I turned it back in, all the conversations I had  
23 regarding this case were on that phone.

24 Q. Including every conversation you had with  
25 Mr. Baca?

1 A. Yeah, from the time I got the phone.

2 Q. So -- and just to clarify, so you had never  
3 used your personal phones, no matter --

4 A. From the time I got the phone, to the time  
5 I gave the phone back, all the conversations  
6 regarding this case, that I'm aware of, came on that  
7 phone, they're on that phone.

8 Q. On the FBI phone?

9 A. On the FBI phone.

10 MR. LOWRY: No further questions, Your  
11 Honor.

12 THE COURT: Thank you, Mr. Lowry.

13 All right. Mr. Montoya, you may step down.

14 THE WITNESS: Thank you.

15 THE COURT: Does anybody need Mr. Montoya  
16 further for this hearing? Can he be excused?

17 MR. CASTELLANO: Yes, Your Honor.

18 THE COURT: Excused, Mr. Adams?

19 Anybody else? All right. Is there any  
20 objection? Mr. Montoya, you're excused from the  
21 proceedings. Thank you for your testimony.

22 THE WITNESS: Thank you, Your Honor.

23 THE COURT: All right. Mr. Adams, do you  
24 have further witnesses or evidence you wish to  
25 present?

1 MR. ADAMS: No, sir, that's it.

2 THE COURT: All right. Do you want to  
3 argue your two motions then?

4 Does the Government have any further  
5 witnesses or evidence on these motions, Mr. Beck?

6 MR. BECK: No, Your Honor.

7 THE COURT: Mr. Adams, do you want to argue  
8 them?

9 MR. ADAMS: Judge, I want to stand,  
10 basically, on our motion, and -- but I do think a  
11 credibility determination from you about whether it's  
12 credible that the phone was accidentally broken or  
13 not is important. I am, I guess, a little  
14 suspicious, naturally, when I'm trying to protect a  
15 client from charges, and I own that.

16 But it seems amazingly suspicious and  
17 convenient to me that there was a phone call where an  
18 SNM person told him to break the phone, and he  
19 agreed -- although he didn't immediately remember  
20 that, he later remembered that -- but he didn't mean  
21 it, and yet the phone was broken before he turned it  
22 in, where a bag of electronics is placed behind a  
23 trailer wheel, with no witnesses around, and is run  
24 over. That seems unbelievable to me, but -- so I think  
25 that credibility determination -- you may find him

1 believable, and I may -- we may have a difference of  
2 opinion on that. But that strikes me as not worthy  
3 of belief in this courtroom, that it happened the way  
4 Mr. Montoya suggested it happened. I think, if you  
5 find him to not be credible on that, then you have a  
6 government agent intentionally destroying evidence  
7 that could be used by the defense.

8 And we stand by our pleading. Thank you.

9 THE COURT: All right. Is that for both  
10 motions, Mr. Adams, or do you want to take them  
11 separately?

12 MR. ADAMS: I think they both basically  
13 have been rolled into 1529, once 1330 was filed, then  
14 we got more information back. So I think everything  
15 has been incorporated into 1529.

16 THE COURT: All right. Thank you,  
17 Mr. Adams.

18 Anybody else want to say anything in  
19 support of Mr. Garcia's motions?

20 All right. Mr. Beck, are you going to do  
21 the legal argument on it?

22 MR. BECK: I think, given Mr. Montoya's  
23 testimony, I think we can -- I think his statement  
24 appears objectively credible. He said that he was  
25 really concerned with his wife's laptop, her

1 tablet -- or his daughter's tablet, and his wife's  
2 Nook. He also said that he thought it fell off the  
3 trailer. He didn't place it on the ground. He  
4 didn't do any of those things. It seems to me  
5 credible that, in a rush to leave town, a backpack  
6 with electronics could fall off his RV or his  
7 trailer. So those things appear credible.

8 It's also corroborated by Agent Acee's  
9 testimony. It's exactly what Mr. Montoya said to him  
10 when Mr. Montoya didn't have any reason to lie or to  
11 make up a story or to destroy the phone.

12 Mr. Montoya's testimony also is the same as  
13 Agent Acee's, that he had multiple personal  
14 cellphones, and he used that cellphone only to  
15 converse with SNM members.

16 There is -- so where there is a burden to  
17 show that the phone was apparently exculpatory under  
18 Trombetta, there is no evidence of that presented  
19 today where, under Youngblood, it must be possibly  
20 exculpatory. I'm not sure that that's there.

21 But, regardless, there was not evidence  
22 today of any bad faith destruction. At best, it may  
23 have been negligence for Agent Acee to throw the  
24 phone away. And it may have been negligent of Mr.  
25 Montoya to run over the phone, along with the other

1 electronics. But even if that were true, that  
2 doesn't meet the Trombetta or Youngblood standard.

3 I guess I'll answer any questions the Court  
4 has. But I think that's probably sufficient for the  
5 argument.

6 THE COURT: All right. Thank you, Mr.  
7 Beck.

8 Mr. Adams, I'll give you the last word.

9 MR. ADAMS: Thank you. I do appreciate  
10 that because I had a couple of little things that --  
11 this is an impulse I sometimes should resist, saying  
12 them out loud, but I can't resist this one: In the  
13 rush to leave town, this gentleman accidentally ran  
14 over a bag of electronics. He was very hard to pin  
15 down on dates, and I think that was probably honest;  
16 he has no idea what the dates were.

17 But sometime between December 3, 2015, when  
18 everything -- when the arrests were made, and his  
19 court appearance, when he turned over the broken  
20 equipment to Special Agent Acee -- which wasn't  
21 photographed and later thrown away -- the rush to  
22 leave town seemed to be over a couple of weeks where  
23 he was packing. In his haste to leave town -- he  
24 didn't leave again, after his court date, for several  
25 days, maybe a couple of weeks. So I don't think it



1 really was a rush to leave town. It might have a  
2 rush to break the phone, but it wasn't a rush to  
3 leave town.

4 And the Government's position is  
5 interesting. They're saying he's credible. But he  
6 doesn't remember anything except that he doesn't like  
7 the SNM guys, and that they're to blame for  
8 everything wrong with him. So he says, essentially,  
9 the Government's position is: He's a credible  
10 junkie. And I just don't think anything about his  
11 testimony suggested there was any credibility at all  
12 to anything he asserted. He couldn't give dates,  
13 timelines. He hadn't reviewed the tapes to see if  
14 they were accurate. It doesn't suggest credibility.

15 Now, we may be a little weak on  
16 demonstrating the significance of our prejudice. I'm  
17 happy to stand on the pleadings on that, because I  
18 think we have some vulnerability on those points.  
19 But the points about his haste being believable, I  
20 just don't think it is. And that him being  
21 believable is a whole -- I just think there are a  
22 lot, a lot of -- I think you have to really bend over  
23 backwards to find that he was credible about the  
24 destruction of the phone.

25 And I'll say, if he were honest about it,

1 he probably would have called Acee from his other  
2 array of cellphones immediately after the destruction  
3 saying, Oh, oh, sorry about that. And he didn't do  
4 that. He was carrying around a bag of broken phones  
5 for an unspecified period of time. I mean, it's just  
6 bizarre and not worthy of belief, respectfully.

7 Thank you for indulging my last points.

8 THE COURT: After that, I'm reluctant to  
9 find him credible. But I am. I do think it needs a  
10 credibility determination, and I do think he was  
11 credible. I had an opportunity to observe his  
12 demeanor. And it happened -- I do think it happened  
13 the way that Mr. Montoya described it. It is an  
14 objectively credible story that he gives. And the  
15 fact that he destroyed some other electronics at the  
16 same time; that he destroyed his wife's and  
17 daughter's at the same time, I think does add some  
18 credibility to it. There is not something specific  
19 as to this phone, dropping it down a toilet, or just  
20 this phone got destroyed.

21 Also, the stories between the testimony of  
22 Mr. Acee and Mr. Montoya were consistent. There  
23 seems to be a consistency over time. Also, in  
24 details. I do think that we're not dealing with a  
25 great risk of any sort of evidence, much less

1 exculpatory evidence, because it was only this phone  
2 that was used to call SNM members. So I think we  
3 'have a high degree of assurance that all the  
4 evidence from it has been obtained.

5 I don't see any evidence of bad faith on  
6 behalf of Mr. Montoya or Mr. Acee that would meet the  
7 Trombetta or Youngblood standards. I think that in  
8 both situations, at most, you saw negligence by Mr.  
9 Acee in throwing away a phone, and by Mr. Montoya in  
10 running over the phone.

11 So I'm going to deny both motions and not  
12 suppress any of the evidence, or dismiss any portion  
13 of the case against Mr. Garcia, or any other  
14 defendants.

15 Well, by my account, that concludes our  
16 motion work. Is there anything else before we take  
17 our leave and head back to -- get ready for the  
18 trial? Anything else I can do for you? Anything  
19 else you'd like to discuss with me? Any more  
20 guidance? Evidentiary rulings?

21 Ms. Armijo? Mr. Castellano?

22 MS. ARMIJO: No, Your Honor. I don't  
23 believe so. Thank you.

24 THE COURT: How about from the defendants?

25 All right. Well, everybody be safe. We'll

1 see you at 8:30 -- the five defendants, we'll see you  
2 and your counsel, the Government, 8:30 on Monday,  
3 January 29.

4 Contact Ms. Wild if we need to be of any  
5 further assistance. I'm going to keep cranking out  
6 these opinions. If there is something special you  
7 want, let us know.

8 Otherwise, I appreciate your hard work  
9 pretrial. Look forward to trying the case with you  
10 on Monday the 29th. Be safe.

11 (The Court was adjourned.)  
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## C-E-R-T-I-F-I-C-A-T-E

UNITED STATES OF AMERICA

DISTRICT OF NEW MEXICO

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Official Court Reporter for the State of New Mexico,  
do hereby certify that the foregoing pages constitute  
a true transcript of proceedings had before the said  
Court, held in the District of New Mexico, in the  
matter therein stated.

In testimony whereof, I have hereunto set my  
hand on January 18, 2018.

  
\_\_\_\_\_  
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